[redacted]

No. [redacted]

HUGHES TOOL COMPANY, PETITIONER,

v.

TRANS WORLD AIRLINES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE [redacted] CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 24, 1964
CERTIORARI GRANTED NOVEMBER 16, 1964

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 28406

TRANS WORLD AIRLINES, INC.,
Plaintiff-Appellee,

against

HOWARD R. HUGHES and RAYMOND M. HOLLIDAY,
Defendants,

and

HUGHES TOOL COMPANY,
Defendant-Appellant,

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, METROPOLITAN LIFE INSURANCE COMPANY, IRVING TRUST COMPANY, DILLON, READ & CO. INC., BEN-FLEMING SESSEL, JAMES F. OATES, JR., HARRY C. HAGERTY AND CHARLES C. TILLINGHAST, JR.,
Additional Defendants-Appellees,

and

ERNEST R. BREECH,
Additional Defendant.

APPENDIX TO BRIEF OF DEFENDANT-APPELLANT HUGHES TOOL COMPANY

CHESTER C. DAVIS, Esq.,
Attorney for Defendant-Appellant,
Hughes Tool Company,
120 Broadway,
New York 5, N. Y.

Dated: September 9, 1963

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United States Court of Appeals

FOR THE SECOND CIRCUIT

TRANS WORLD AIRLINES, INC., *Plaintiff-Appellee,* against HOWARD R. HUGHES and RAYMOND M. HOLLIDAY, *Defendants,* and HUGHES TOOL COMPANY, *Defendant-Appellant,* and THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, METROPOLITAN LIFE INSURANCE COMPANY, IRVING TRUST COMPANY, DILLON, READ & CO. INC., BEN-FLEMING SESSEL, JAMES F. OATES, JR., HARRY C. HAGERTY and CHARLES C. TILLINGHAST, JR., *Additional Defendants-Appellees,* and ERNEST R. BREECH, *Additional Defendant.*	No. 28406

Summary of Pertinent Docket Entries Pursuant to Rule 15(b).

June 30, 1961—Filed complaint and summons; also filed order that these and other papers be kept under seal.

Summary of Pertinent Docket Entries Pursuant to Rule 15(b).

August 14, 1961—Filed opinion #27139 granting Toolco's motion for priority of taking depositions—Herlands, J.

August 31, 1961—Filed order referring action to Metzner, J. for all purposes—Ryan, J.

February 8, 1962—Filed pretrial order (a) appointing J. Lee Rankin as Special Master to act in connection with depositions and other discovery proceedings, and (b) fixing a deposition schedule—Metzner, J.

February 14, 1962—Filed Toolco's Answer and Counterclaims together with order adding additional parties as defendants.

February 26, 1962—Filed notices of motions by additional defendants for revising the schedule of depositions.

March 6, 1962—Filed pretrial order re priority of discovery—Metzner, J.

March 29, 1962—Metzner, J. signed order to show cause returnable April 11, 1962, on motion of TWA to strike or to dismiss Toolco's counterclaims (filed with Clerk on August 1, 1963).

April 4, 1962—Filed Toolco's notice of motion, returnable before Special Master, to declare certain documents privileged or otherwise not subject for production.

April 18, 1962—Hearing held before Metzner, J. re TWA's motion to strike or dismiss Toolco's counterclaims 1-5 and for dismissal or summary judgment as to sixth counterclaim.

May 11, 1962—Filed affidavit and notice of motion by Toolco for review of Special Master's opinion of April 17, 1962 and order of May 2 and 3, 1962 re privileged documents.

Summary of Pertinent Docket Entries Pursuant to Rule 15(b).

May 17, 1962—Hearing held before Metzner, J. to review Special Master's order re privileged documents.

July 12, 1962—Filed pretrial order, *inter alia*, reaffirming Toolco's priority in taking depositions—Metzner, J.

July 24, 1962—Filed memorandum of Metzner, J. endorsed on Toolco's motion filed May 11, 1962; Court sustained rulings of Special Master with respect to Toolco's claim of attorney-client privilege.

September 26, 1962—Filed affidavit and notice of motion by Toolco for an order directing Rule 16 proceedings.

January 10, 1963—Filed pretrial order of Metzner, J.: (a) deposition of Hughes to commence on February 11, 1963; (b) Rule 16 application denied without prejudice to a renewal 30 days after completion of Hughes' deposition; (c) Toolco to produce attorney-client communications; (d) TWA to answer Toolco's interrogatories within 60 days after Hughes' deposition.

January 18, 1963—Filed affidavit and notice of motion (dated January 14) by Toolco for Rule 30(b) relief re Hughes' deposition, alternatively to bring on its motion to dismiss, and for stay of order that it produce attorney-client communications pending determination of its motion to dismiss or until such time that it may obtain appellate review.

January 19, 1963—Filed opinion #28550 of Metzner, J., denying Toolco's motions filed January 18, 1963, except that date in January 10 order for production of attorney-client communications amended to January 22, 1963.

January 22, 1963—Filed stipulation extending time for production of documents until January 23, 1963; filed

Summary of Pertinent Docket Entries Pursuant to Rule 15(b).

Toolco's notice of appeal from order of January 10, 1963 as modified by order of January 19, 1963.

January 23, 1963—Hearing held before Court of Appeals for Second Circuit (Lumbard, C. J., Kaufman and Marshall, JJ.)—Appeal dismissed on motion of appellees and leave to file petition for writ of mandamus or prohibition denied.

January 25, 1963—Filed notice of motion by Toolco to review order of Special Master re "financial" documents; filed notice of withdrawal by TWA of motion filed March 29, 1962, for order striking or dismissing Toolco's counterclaims; filed replies to Toolco's counterclaims by all additional defendants except Breech, Dillon Read and Tillinghast.

January 26, 1963—Filed notice of motions by additional defendants to adjudge Toolco in civil contempt, etc.

January 28, 1963—Pretrial hearing held before Metzner, J., *inter alia*, re review of Special Master's order that Toolco produce "financial" documents.

February 1, 1963—Filed pretrial order: (a) permitting TWA to withdraw its motions filed on March 29, 1962; (b) ordering TWA and Tillinghast to answer counterclaims within 10 days after Hughes' deposition; and (c) affirming Special Master re "financial" documents —Metzner, J.

February 5, 1963—Filed answer of Dillon Read to Toolco's counterclaims.

February 6, 1963—Filed notice of motion by Toolco for order staying further proceedings on its counterclaims pending disposition by CAB with respect to "Complaint of Hughes Tool Company and Request for In-

Summary of Pertinent Docket Entries Pursuant to Rule 15(b).

vestigation"; pretrial hearing held; filed memorandum endorsed on motion filed January 18, 1963, denying Toolco's motion to dismiss, formal opinion to follow—Metzner, J.

February 7, 1963—Filed opinion #28588 re denial of Toolco's motion to dismiss—Metzner, J.

February 8, 1963—Pretrial hearing held; Metzner, J. denied Toolco's motion (filed Feb. 6, 1963) for a stay of proceedings on its counterclaims.

February 11, 1963—Filed TWA's answer to Toolco's counterclaims.

February 13, 1963—Filed Tillinghast's answer to Toolco's counterclaims.

February 18, 1963—Filed notice of motion by additional defendants for an order directing the entry of a final judgment dismissing Toolco's counterclaims with prejudice; filed affidavit and order to show cause re judgment for TWA on its complaint and for dismissal of Toolco's counterclaims with prejudice.

February 21, 1963—Pretrial hearing held re motions filed February 18, 1963; filed memorandum endorsed on Toolco's motion filed February 6, 1963, denying stay of proceedings—Metzner, J.; motion of additional defendants filed January 26, 1963 deemed withdrawn in light of their motion filed February 18, 1963.

May 2, 1963—Pretrial hearing held re motions filed February 18, 1963.

May 3, 1963—Filed opinion #28826 ordering that (a) a judgment by default shall be entered in favor of TWA against Toolco and Holliday on the complaint, damages to be determined by Special Master, and (b) Toolco's

Summary of Pertinent Docket Entries - Pursuant to Rule 15(b).

counterclaims be dismissed with prejudice as to TWA; filed memo endorsed on motion filed February 18, 1963, ordering dismissal with prejudice of Toolco's counterclaims as to the additional defendants—Metzner, J.

May 28, 1963—Filed opinion #28882, granting TWA's motion for summary judgment on Toolco's sixth counterclaim—Metzner, J.; filed and entered judgments dismissing counterclaims 1-5 with prejudice as to TWA and all additional defendants except Breech.

June 26, 1963—Filed Toolco's notice of appeal from judgments and order entered May 28, 1963.

TWA Complaint

[4]

[CAPTION] Civil Action No. 61-2324

COMPLAINT

Plaintiff, by its attorneys, Cahill, Gordon, Reindel & Ohl, for its complaint herein against the above-named defendants, respectfully alleges:

FIRST CLAIM

I.

Nature of Claim and Jurisdiction of Court

1. This complaint is filed and this action instituted against defendants under Sections 4, 12 and 16 of the Clayton Act (15 U.S.C. §§ 15, 22 and 26 (1958)) in order to declare, to prevent and restrain, and to recover damages resulting from, the violation by defendants, as hereinafter alleged, of Section 1 of the Sherman Act (15 U.S.C. § 1 (1958)), of Section 2 of the Sherman Act (15 U.S.C. § 2 (1958)), of Section 3 of the Clayton Act (15 U.S.C. § 11 (1958)), and of Section 7 of the Clayton Act (38 Stat. 731, 15 U.S.C. (1946 Ed.) § 18).

[5]

II.

Description of Parties

2. Plaintiff (hereinafter sometimes called "TWA") is a corporation organized in 1934 and existing under the laws of the State of Delaware and maintains its principal executive offices in the City of New York. TWA is the only air carrier authorized under Certificates of Public Convenience and Necessity granted by the Civil Aeronautics Board to provide both transcontinental and transatlantic scheduled air transportation in the interstate and foreign commerce of the United States, and is now providing such transportation, in competition at various points with various other United States-Flag and foreign-flag air carriers.

3. Defendant Hughes Tool Company (hereinafter sometimes called "Toolco") is a corporation organized and existing under the laws of the State of Delaware, has assets of several hundred million dollars, transacts business within the Southern District of New York, and was and is engaged in interstate commerce, *inter alia,* since in or about 1939 in the development, manufacture and acquisition of aircraft and related equipment from the manufacturers thereof in various states and in the sale and lease of such aircraft to air carriers in various other states for use in interstate and foreign commerce.

4. Defendant Howard R. Hughes (hereinafter sometimes called "Hughes") was, throughout the period of the matters hereinafter complained of, and is an officer and the sole stockholder of Toolco and directed, controlled and dominated its activities.

[6] 5. Defendant Raymond M. Holliday (hereinafter sometimes called "Holliday") for some years past was and is the chief operating officer of Toolco in charge of TWA affairs and since 1959 and to date has been a director of TWA.

6. Atlas Corporation, named herein as a co-conspirator but not as a defendant (hereinafter called "Atlas"), is a corporation organized in 1936 and existing under the laws of the State of Delaware. Northeast Airlines, Inc., a corporation organized and existing under the laws of the State of Massachusetts (hereinafter called "Northeast"), is an air carrier engaged in the business of providing scheduled air transportation in interstate commerce, and for some years past has been and is now controlled by Atlas, by means, *inter alia,* of the ownership by Atlas of 58% of the stock of Northeast. The defendant Hughes for some years past has had the beneficial ownership of Voting Trust certificates issued with respect to 11% of the Common Stock of Atlas.

TWA Complaint

III.

Commerce Involved

7. The trade and commerce involved in this action concerns:

(a) The furnishing of aircraft by sale, lease or other means in interstate commerce of the United States to TWA and other air carriers for use in air transportation in interstate and foreign commerce of the United States, as "aircraft", "air carrier" and "air transportation" are defined in 49 U.S.C. §.1301.

[7] (b) The furnishing of jet-powered aircraft by sale, lease or other means in interstate commerce of the United States to TWA and other air carriers for use in air transportation in interstate and foreign commerce of the United States.

(c) The furnishing of aircraft by sale, lease or other means in interstate commerce of the United States to TWA for use in the business of air transportation in interstate and foreign commerce of the United States.

(d) The furnishing of aircraft—by sale, lease or other means in interstate commerce of the United States—used by scheduled United States-Flag air carriers between certain pairs of cities in the United States, such pairs of cities being those pairs of cities between which in each instance TWA provides more than 60% of the scheduled air transportation which is provided by all United States-Flag air carriers.

(e) The furnishing of aircraft—by sale, lease or other means in interstate commerce of the United States—used by scheduled United States-Flag air carriers between certain pairs of cities in the United States, and between the United States and certain foreign cities, such pairs of locations being those pairs of locations between which in each instance

TWA Complaint

3. Defendant Hughes Tool Company (hereinafter sometimes called "Toolco") is a corporation organized and existing under the laws of the State of Delaware, has assets of several hundred million dollars, transacts business within the Southern District of New York, and was and is engaged in interstate commerce, *inter alia*, since in or about 1939 in the development, manufacture and acquisition of aircraft and related equipment from the manufacturers thereof in various states and in the sale and lease of such aircraft to air carriers in various other states for use in interstate and foreign commerce.

4. Defendant Howard R. Hughes (hereinafter sometimes called "Hughes") was, throughout the period of the matters hereinafter complained of, and is an officer and the sole stockholder of Toolco and directed, controlled and dominated its activities.

[6] 5. Defendant Raymond M. Holliday (hereinafter sometimes called "Holliday") for some years past was and is the chief operating officer of Toolco in charge of TWA affairs and since 1959 and to date has been a director of TWA.

6. Atlas Corporation, named herein as a co-conspirator but not as a defendant (hereinafter called "Atlas"), is a corporation organized in 1936 and existing under the laws of the State of Delaware. Northeast Airlines, Inc., a corporation organized and existing under the laws of the State of Massachusetts (hereinafter called "Northeast"), is an air carrier engaged in the business of providing scheduled air transportation in interstate commerce, and for some years past has been and is now controlled by Atlas, by means, *inter alia*, of the ownership by Atlas of 58% of the stock of Northeast. The defendant Hughes for some years past has had the beneficial ownership of Voting Trust certificates issued with respect to 11% of the Common Stock of Atlas.

TWA Complaint

III.

Commerce Involved

7. The trade and commerce involved in this action concerns:

(a) The furnishing of aircraft by sale, lease or other means in interstate commerce of the United States to TWA and other air carriers for use in air transportation in interstate and foreign commerce of the United States, as "aircraft", "air carrier" and "air transportation" are defined in 49 U.S.C. § 1301.

[7] (b) The furnishing of jet-powered aircraft by sale, lease or other means in interstate commerce of the United States to TWA and other air carriers for use in air transportation in interstate and foreign commerce of the United States.

(c) The furnishing of aircraft by sale, lease or other means in interstate commerce of the United States to TWA for use in the business of air transportation in interstate and foreign commerce of the United States.

(d) The furnishing of aircraft—by sale, lease or other means in interstate commerce of the United States—used by scheduled United States-Flag air carriers between certain pairs of cities in the United States, such pairs of cities being those pairs of cities between which in each instance TWA provides more than 60% of the scheduled air transportation which is provided by all United States-Flag air carriers.

(e) The furnishing of aircraft—by sale, lease or other means in interstate commerce of the United States—used by scheduled United States-Flag air carriers between certain pairs of cities in the United States, and between the United States and certain foreign cities, such pairs of locations being those pairs of locations between which in each instance

TWA provides the only scheduled air transportation provided by United States-Flag air carriers.

[8] (f) The financing in interstate commerce of the United States of the acquisition by sale, lease or other means of aircraft for use by TWA in air transportation in interstate and foreign commerce of the United States.

8. The nature and extent of such trade and commerce with respect to TWA is more fully described as follows:

(a) TWA has, since its organization in 1934, operated a domestic air carrier system between certain cities in the United States. The scheduled air transportation provided by TWA in the United States has been and is a substantial proportion of that provided by all air carriers within the United States. During the periods set forth below, TWA provided the percentages set forth below of all scheduled passenger miles provided by all domestic scheduled trunk air carriers within the United States:

Year 1955	14.9%
Year 1956	15.1%
Year 1957	14.9%
Year 1958	15.0%
Year 1959	16.3%
Year 1960	15.2%

(b) Since 1946, TWA has operated an international air transportation system between the United States and certain cities in Europe, Africa and Asia. The scheduled air transportation provided by TWA between the United States and certain foreign cities has been and is a substantial proportion of that provided by all [9] United States-Flag air carriers and of that provided by all air carriers. During the periods set forth below, TWA provided the percentages set forth below of all passenger miles provided by

scheduled United States-Flag air carriers between the United States and foreign cities:

	% of U. S. Flag
Year 1955	13.6%
Year 1956	12.9%
Year 1957	12.0%
Year 1958	12.5%
Year 1959	9.5%
Year 1960	12.5%

(c) In its operations, TWA has used, and is using, both in its domestic operations and in its international operations, a substantial proportion of all of the aircraft, both jet-powered and otherwise, operated by all scheduled air carriers operating within the United States, by all of the United States-Flag scheduled air carriers operating between the United States and foreign cities and by all of the scheduled air carriers operating between the United States and foreign cities.

(d) TWA provides and has provided a substantial proportion of the scheduled transportation in jet-powered aircraft provided by all carriers within the United States, by all United States-Flag air carriers between the United States and foreign cities and by all air carriers between the United States and foreign cities. In 1959, TWA provided over 1.1 billion passenger miles of scheduled jet air transportation.

[10] (e) The requirements of TWA for commercial jet-powered aircraft constitute and have constituted a separate and distinct market for United States aircraft manufacturers by reason, *inter alia*, of design and flight characteristic requirements, fleet and operating requirements, and the structure of the domestic and foreign routes of TWA.

(f) TWA constitutes and has constituted a substantial proportion of the market for the various types of commercial aircraft made by United States aircraft manufacturers. For example, during the period 1958 through 1960, TWA purchased and leased jet-powered aircraft for amounts aggregating substantially in excess of $100,000,000, which aircraft were manufactured by manufacturers in various states of the United States.

(g) TWA constitutes and has constituted a substantial proportion of the market for the various types of commercial jet-powered aircraft, both long-range and otherwise, made by United States manufacturers. For example, TWA currently has more than $150,000,000 worth of jet-powered aircraft on order.

(h) TWA constitutes and has constituted a dominant portion of a substantial market for aircraft, that is, the market for aircraft for use between certain pairs of United States cities and between the United States and certain foreign cities. In 1959, TWA provided the only scheduled air transportation between certain pairs of United States cities, such transportation amounting to 332,000,000 passenger miles [11] accommodating 391,000 passengers and accounting for approximately 7.8% of the total number of domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 90% and 100% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to over 680,000,000 passenger miles accommodating over 1,000,000 passengers and accounting for approximately 16.0% of the total number of domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 80% and 90% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transpor-

tation by TWA amounting to over 331,000,000 passenger miles accommodating 649,000 passengers and accounting for approximately 7.8% of the total domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 70% and 80% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to 417,000,000 passenger miles accommodating 412,000 passengers and accounting for approximately 9.8% of the total domestic passenger miles supplied by TWA in 1959. In 1959, TWA provided between 60% and 70% of the passenger miles of scheduled air transportation between certain pairs of United States cities, such transportation by TWA amounting to 218,000,000 passenger miles accommodating 251,000 passengers and accounting for 5.1% of the domestic passenger miles provided by TWA in 1959. [12] Thus, in 1959, TWA provided more than 60% of the passenger miles between certain pairs of United States cities, such transportation by TWA amounting to almost 2 billion passenger miles accommodating more than 2.7 million passengers and accounting for 46.5% of the domestic passenger miles provided by TWA in 1959. TWA is the only United States-Flag air carrier which is now authorized to provide scheduled air transportation of passengers between the United States and any of the following cities: Athens, Geneva, Zurich, Milan, Algiers, Tunis, Cairo, Tel Aviv, Dahran, Bombay and Colombo. Long-range aircraft are used by TWA between the United States and the above-named foreign cities; all other aircraft used by TWA are usable between one or more of the pairs of United States cities between which TWA provides the only scheduled air transportation. TWA in 1959 provided the following percentages of the scheduled air transportation measured by number of transatlantic passengers provided by all air

carriers between the United States and the three principal ports of entry (London, Paris and Lisbon) into Europe, Africa and Southwest Asia: United States-London, 11%; United States-Paris, 17%; United States-Lisbon, 32%.

(i) In 1960, operating revenues of TWA were substantially in excess of $300,000,000; net income was in excess of $6,000,000. During the first quarter of 1961, TWA had an operating loss of approximately $13,000,000 and a net loss of approximately $9,000,000.

[13]

IV.

The Offenses Charged

9. Beginning in or about the year 1939 and continuing up to and including the date of the filing of this complaint, the defendants, Atlas and other persons acting for each of them have been and are now engaged in:

(a) A combination and conspiracy to restrain interstate and foreign commerce of the United States in violation of Section 1 of the Sherman Act;

(b) A combination to restrain interstate and foreign commerce of the United States in violation of Section 1 of the Sherman Act by providing financing of the acquisition by plaintiff of aircraft, including jet-powered aircraft, only upon the condition that plaintiff acquire all such aircraft from defendant Toolco;

(c) A combination to restrain interstate and foreign commerce of the United States in violation of Section 1 of the Sherman Act by requiring plaintiff to boycott all suppliers of aircraft, including jet-powered aircraft, except defendant Toolco;

(d) A combination and conspiracy to monopolize a substantial segment of the interstate and foreign

trade and commerce of the United States in violation of Section 2 of the Sherman Act;

(e) An attempt to monopolize a substantial segment of the interstate and foreign trade and commerce [14] of the United States in violation of Section 2 of the Sherman Act;

(f) Sales and leases of jet-powered aircraft on the condition, agreement and understanding that the purchaser or lessee shall not buy or lease the goods of a competitor or competitors of the vendor or lessor, in violation of Section 3 of the Clayton Act; and

(g) Acquisitions of the stock of a corporation in violation of Section 7 of the Clayton Act.

10. Each act of the defendants and Atlas hereinafter alleged was done in furtherance of the offenses charged in the preceding paragraph and was a part thereof and was done with the primary purpose of restraining and monopolizing the trade and commerce described above. It was the intent of the defendants and Atlas, *inter alia:*

(a) That Toolco would become a dominant source of supply of jet-powered aircraft to air carriers;

(b) That the defendants would seize control over TWA and its business and use such control for their own purposes;

(c) That Toolco would become the sole source of supply of jet-powered aircraft to TWA;

(d) That defendants would have TWA as a captive market and would supply the requirements of TWA for aircraft, including jet-powered aircraft, upon terms advantageous to themselves;

[15] (e) That the requirements of TWA for aircraft, including jet-powered aircraft, would be enlarged for the benefit of defendants and Atlas by various means;

(f) That suppliers of aircraft to TWA other than the defendants would be boycotted and foreclosed from the trade and commerce hereinbefore alleged;

(g) That defendants would supply TWA with the aircraft essential to its business only on the condition that TWA would accept such financing arrangements relating to the aircraft as the defendants dictated, and in turn that defendants would allow TWA to procure financing essential for the acquisition of the aircraft it needed only on the condition that TWA would accept such aircraft as the defendants dictated; and

(h) That the defendants and Atlas would obtain substantial profits for themselves, at the expense of TWA and other air carriers, as the result of restrictions upon competition in the trade and commerce hereinbefore alleged.

V.

Acts Committed Prior to December 1960

11. Commencing in or about the year 1939 and at various times thereafter, Toolco, pursuant to an understanding with and at the direction of Hughes, acquired Common Stock of TWA. By such acquisitions, Toolco acquired more than 78% of such Common Stock. The purpose and the [16] effect of the acquisitions so made and the use by defendants of the stock so acquired have been to foreclose competing suppliers of aircraft from the opportunity for supplying aircraft to TWA.

12. Since in or about 1955 one of the most important single factors in the operation of and competition among air carriers engaged in air transportation in interstate and foreign commerce has been the prospect, introduction and eventual utilization of jet-powered aircraft.

13. By 1955, aircraft manufacturers (including Boeing Company, hereinafter called "Boeing", and Douglas Air-

craft Company, Inc., hereinafter called "Douglas") had prepared — to the general knowledge of the air carrier industry — plans and drawings and otherwise had undertaken preparations for the manufacture by themselves of jet-powered aircraft intended for use by air carriers. Beginning in or about 1955, many air carriers devoted substantial efforts of their own (a) to determining whether the jet-powered aircraft then being developed by Boeing, Douglas or others could be best utilized by them in their respective operations, and (b) to obtaining jet-powered aircraft suitable for their needs, including the participation by them in the design of such aircraft. Boeing and Douglas each contemplated the manufacture of and did ultimately manufacture jet-powered aircraft for short-range flights and for medium and long-range flights suitable for the respective needs of such air carriers.

[17] 14. Prior to 1955, defendants and General Dynamics Corporation (hereinafter called "Convair") entered into an arrangement for the joint development of a jet-powered aircraft to be manufactured by Convair and to be supplied by the defendants to air carriers, including TWA. In furtherance of that arrangement, the defendants required TWA to provide to the defendants and Convair the use of TWA's highly skilled engineering and other personnel, who were to participate and did participate in the design and development of the aircraft to be manufactured by Convair. It was the intention of defendants that TWA would serve as a captive market for such aircraft which Toolco would procure to supply to TWA and other air carriers. A jet-powered aircraft, designated as Model 18, was so designed. In 1955, the defendants and Convair concluded that the continued development of, and manufacture of, Model 18 was not in their respective self-interests, and the program for its development and production was then abandoned.

15. Prior to May 1, 1956, the defendants also entered into a plan under which Toolco would itself commence the

manufacture of a jet-powered aircraft with design and range characteristics making it suitable for use on both domestic and transatlantic routes. The defendants intended that Toolco would furnish this aircraft, to be known as the "Golden Arrow", by sale, lease or other means both to TWA and to other air carriers. Activities looking to such manufacture by Toolco of the [18] "Golden Arrow" were actively pursued until in or about mid-1956, and were thereafter abandoned by the defendants.

16. In or about October 1955, at approximately the time of the decision to abandon the Model 18, the first firm order for jet-powered aircraft was placed with a United States aircraft manufacturer by a United States-Flag air carrier; that order was placed with Boeing by Pan American World Airways, Inc., TWA's principal international competitor. In the ensuing month and a half, principal United States and foreign air carriers — including major competitors of TWA — placed orders for jet-powered aircraft with Boeing or Douglas. These air carriers ordered 59 jet-powered aircraft from Boeing and 95 jet aircraft from Douglas, which orders were scheduled for delivery in 1959 and 1960.

17. During this period when other United States-Flag air carriers were placing orders for jet-powered aircraft, and thereafter, the defendants caused and directed TWA to forego making any arrangements for the acquisition, by sale, lease or otherwise, of any jet-powered aircraft. In or about February 1956, the defendants arranged for Toolco to place orders for 15 jet-powered aircraft with Boeing. Thereafter, the defendants arranged for Toolco to place orders with Boeing for an additional 18 jet-powered aircraft. In or about April 1956, the defendants arranged for Toolco to place orders for at least 30 Model 880 jet-powered aircraft to be manufactured by Convair.

[19] 18. The purchase orders placed by Toolco with Convair and Boeing reserved to Toolco the privilege of assigning to TWA the right to acquire the jet-powered aircraft so

purchased. Despite repeated requests by TWA, Toolco refused throughout the period of 1956 to 1960 to assign to TWA the rights to acquire such aircraft. In or about June, 1959, defendants caused six of the Boeing jet-powered aircraft then on order by Toolco to be diverted to the principal transatlantic competitor of TWA.

19. During the period 1956 to 1960, the defendants required Convair to make certain changes in the design of Model 880 aircraft on order by Toolco, but the defendants prevented TWA from arranging with Convair for certain design modifications which were desired by TWA and which would not have interfered with the scheduled dates of delivery. During the year 1960 the defendants also prevented and restricted TWA from making acceptance and test flights from time to time of various specific Convair Model 880 aircraft then on order with Convair by Toolco.

20. During the period 1959 to 1960, defendants arranged for the lease to TWA by Toolco of certain jet-powered aircraft on a day-to-day basis. Such aircraft were the first and only jet-powered aircraft made available to TWA by the defendants during the years 1955 to 1960 and the number of aircraft so leased by Toolco to TWA was inadequate for the needs of TWA. Such leases were given on a continuing condition, agreement and understanding that TWA would not purchase or lease aircraft from any other potential supplier thereof. The effect of such continuing condition, agreement and understanding was to foreclose, to all potential suppliers [20] of jet-powered aircraft to TWA other than defendants, the opportunity for selling or leasing jet-powered aircraft to TWA.

21. Prior to May 1960, the exact date being unknown to TWA, Atlas, with knowledge of the conspiracy and other violations of antitrust laws herein alleged, then joined with the defendants in said violations, and agreed to cause Northeast to submit to TWA a proposed agreement of merger upon terms advantageous to the defendants and

Atlas and disadvantageous to TWA. The purposes of defendants and Atlas in proposing such a merger were

(a) To enlarge TWA's requirements for new aircraft, and thereby to enlarge the demand in the market from which the defendants had foreclosed and would continue to foreclose all other suppliers, and

(b) For Atlas to obtain stock of TWA on terms advantageous to Atlas and its stockholders, including defendant Hughes.

Northeast is a substantial air carrier operating under certificates of public convenience and necessity and serving the East Coast of the United States and Canada. In 1959 Northeast's revenue passenger miles totaled 519,000,000 and its total assets exceeded $35,000,000.

22. In November 1960, while the proposal for merger was pending, the defendants arranged for the lease by Convair to Northeast of six of the Convair Model 880 [21] aircraft which Toolco had ordered from Convair. Among the aircraft so leased to Northeast were three aircraft which Toolco previously by an agreement with TWA of May 9, 1960, had assigned to TWA.

23. Subsequent to the acquisition of stock by Toolco in TWA, defendants for reasons of self-interest continuously refused to allow equity financing by TWA except on condition that, as a result of any such financing, Toolco would be enabled to increase its equity position in TWA and instead caused TWA to obtain funds chiefly by means of debt financing. TWA was thus rendered unable to seek the financing it needed for the acquisition of aircraft except upon the approval of defendants. The purpose of the defendants in rendering TWA dependent upon them for such assistance in financing as defendants might choose to provide, and the effects thereof, were, among other things,

(a) to create and maintain control in the defendants of the business of financing the purchase of aircraft for use by TWA, and

(b) to strengthen defendants' control over the acquisition of aircraft by TWA.

24. From 1955 until December, 1960, the defendants used their power over the financing of aircraft thus obtained to compel TWA to acquire aircraft of the type and in the manner dictated by the defendants and used their power over TWA's acquisition of aircraft, obtained as hereinbefore alleged, to compel TWA to obtain financing for the acquisition [22] of such aircraft of the type and in the manner dictated by the defendants.

25. At least as early as 1955, the needs of United States air carriers for the extensive financing required for acquisition of jet-powered aircraft were recognized throughout the air carrier industry and by others, including the defendants.

26. In 1955 and continuously thereafter until December, 1960, the defendants, pursuant to and in furtherance of their plan to control TWA in a manner advantageous to themselves, directed TWA to make no efforts itself to obtain financing necessary for the acquisition of jet-powered aircraft required for the needs of TWA.

27. Commencing in the year 1955 and continuing thereafter, various other air carriers, including competitors of TWA made appropriate arrangements for the financing of jet-powered aircraft. In 1955 and 1956 various United States air carriers were able to obtain funds at a cost (or interest rate per annum) in 1955 of 4%, and in 1956 at costs ranging from 4¼% to 4¾%.

28. In 1955 and thereafter for a period of several years, the defendants discussed with others various proposals for the financing of jet-powered aircraft, but the defendants did not make arrangements for such financing [23] nor allow TWA to make such arrangements until December 1960, at which time the prevailing cost of funds (or interest rates) for debt financing was approximately 6-6½%.

VI.

The Financing and Acquisition of Jet Aircraft by TWA in and since December 1960

29. In connection with TWA's acquisition from Toolco in December 1960 of certain jet-powered aircraft and the rights to obtain certain additional jet-powered aircraft from Boeing and Convair and in connection with other financial transactions between TWA and Toolco, TWA delivered to Toolco a note dated December 30, 1960 for $100,000,000, carrying an interest rate of 6½%, which note was subordinated to the indebtedness of TWA to various banks and insurance companies for additional funds needed by TWA for the purchase of these aircraft.

30. As part of the arrangements with Toolco above described, TWA agreed to offer to its stockholders not less than $100,000,000 of its subordinated income debentures, with attached warrants to purchase common stock of TWA; the debentures were subordinated to TWA's senior indebtedness to banks and insurance companies. Toolco agreed to purchase, not later than three business days after expiration of the subscription offer, a principal amount thereof equal to the excess of $100,000,000 over the principal amount purchased by others in the offering; Toolco also was given the option [24] to purchase, not later than three business days after the expiration of the subscription offer, all or any part of the debentures not purchased by stockholders pursuant to the subscription offer.

31. As part of the arrangements with Toolco and with banks and insurance companies as above described, Toolco, TWA and three Voting Trustees (Ernest R. Breech, Irving S. Olds and defendant Holliday) executed an agreement dated as of December 15, 1960. The agreement provided that the TWA stock owned and to be owned by Toolco would be placed in a Voting Trust, pursuant to which the Voting Trustees, acting by a majority vote, were empowered to exercise their sole and absolute discretion in respect of the TWA stock deposited with them and accordingly were authorized to elect directors who would be in control of TWA's management and policies.

32. The creation of the Voting Trust above described was required by the financial institutions as a condition to making loans to TWA of $165,000,000 also needed for the purchase of the aforesaid aircraft, and which loans were evidenced by a like amount of senior notes of TWA.

33. The Voting Trust, in which Toolco's TWA stock has been deposited pursuant to the terms of the Voting Trust, provides in Article Thirteenth thereof that it shall terminate on December 15, 1970, unless previously terminated or extended as provided therein.

[25] 34. Thereafter and in early 1961, at a meeting of stockholders of TWA, the Voting Trustees, by majority vote, and other stockholders of TWA entitled to vote duly elected a Board of Directors of TWA and said Board of Directors elected a new President of TWA.

35. In March 1961, after careful consideration of TWA's requirements for additional jet-powered aircraft, the officers of TWA who were concerned with such matters unanimously recommended to the Board of Directors of TWA that TWA's immediate needs for jet-powered aircraft would best be served by the acquisition of 20 aircraft, Boeing Model 707 131-B, and 6 aircraft, Boeing Model 707 331-B. The Board of Directors authorized the purchase of such aircraft. On April 30, 1961, TWA and Boeing agreed on the purchase of these aircraft, with related spare parts and equipment, for delivery in 1962 at an ultimate cost estimated at approximately $187,500,000. Of this amount, TWA expects to provide approximately $40,500,000 from its own funds and to borrow $147,000,000. The borrowing is currently being negotiated with certain insurance companies and banks.

VII.

Acts Committed Subsequent to 1960

36. On and after December 31, 1960, the defendants, despite the execution of the Voting Trust above described and the deposit of Toolco's TWA stock in said Trust, con-

tinued and renewed the offenses described in Paragraphs 9 through 28 above, as hereinafter alleged.

[26] 37. Since during the month of May 1961, the defendants have insistently demanded of TWA that TWA not purchase from Boeing the aircraft described above, but instead that TWA purchase from Toolco 13 Convair Model 990 aircraft which Toolco had previously agreed to purchase from Convair, despite the decision of TWA's Board of Directors, which was known to defendants, that such Convair aircraft are not as suitable for TWA's needs as the aircraft which TWA wishes to purchase and is purchasing from Boeing.

38. During the month of May 1961, defendants wrongfully attempted to coerce TWA into purchasing Convair aircraft from Toolco by maliciously asserting for the first time (a) that TWA might have an obligation to purchase such aircraft from Toolco, (b) that the management of TWA would be derelict in its duty to Toolco if it failed to make such purchases, (c) that TWA's management was without authority to reach decisions on behalf of TWA with respect to such purchases or alternatives thereto, and (d) that the proposed purchases of aircraft from Boeing were not in the interest of TWA. Defendants also sent telegrams and other urgent messages to TWA, threatening TWA, its directors, the Voting Trustees and the financial institutions lending money to TWA with the institution of a suit or suits against TWA, its management, its directors and the Voting Trustees unless TWA decided to purchase and did purchase the Convair aircraft.

[27] 39. During the months of May 1961, the defendants also warned Boeing that its contract with TWA was not binding upon TWA. The defendants hereby maliciously sought to interfere with, to impair and to disrupt the contractual relationship, known to the defendants, between Boeing and TWA, to the advantage of defendants and disadvantage of TWA.

40. The agreements made in December 1960, relating to the financing of TWA's purchase of jet aircraft, required, among other things, that TWA make, not later than May 31, 1961, a public offering of rights to purchase its subordinated income debentures with common stock warrants. In accordance with the provisions of those agreements, the Board of Directors of TWA approved the filing with the Securities and Exchange Commission of a Registration Statement relating to the proposed public offering and such Registration Statement was filed with the Securities and Exchange Commission on March 30, 1961.

41. TWA, in order to comply with its obligation to make the proposed public offering prior to May 31, 1961 as agreed, requested the Securities and Exchange Commission to accelerate the effective date of the Registration Statement to May 18, 1961. Thereupon defendants filed objections with the Securities and Exchange Commission to the request of TWA and demanded that the proposed offering be deferred on the ground, among others, that Toolco had decided for the first time on May 10, 1961 to make a public distribution of the debentures which were being [28] offered by TWA and which were to be acquired by Toolco pursuant to the provisions of the prior agreements.

42. Defendants further demanded that certain amendments be made to the Registration Statement in order to set forth, among other things, certain contentions of defendants then made for the first time by defendants, including, among others:

(a) that notwithstanding the admitted legal power of the Voting Trustees to act, the Voting Trust could not be given effect according to its terms so as to enable TWA to be operated independently of the wishes of the defendants;

(b) that Toolco's position was that it had been compelled to enter into the Voting Trust under conditions which would warrant an immediate termination of the Voting Trust;

(c) that Toolco was considering an attempt to enjoin the consummation of the Boeing purchase transaction above described or taking action for damages against the persons responsible for the Boeing agreements; and

(d) that there might be some basis upon which Toolco could assert an equitable right to sell to TWA the Convair aircraft previously ordered by Toolco.

[29] 43. After considering the contentions so advanced by defendants, the Securities and Exchange Commission accelerated the effective date of the Registration Statement, as amended, so as to make the Registration Statement effective on May 24, 1961.

44. After the effective date of the Registration Statement and while the public offering was in progress, the defendants publicly announced that they proposed to sell up to 85% of the rights to purchase subordinated debentures which defendants were obligated to acquire under the terms of the aforesaid agreements, with the result that there was a substantial decrease in the prices at which such rights could be sold and were sold to the public.

45. The contentions made by the defendants as alleged in Paragraph 42 above and the public announcement made by the defendants as alleged in Paragraph 44 above were made for the purpose and with the intention that they would receive wide public circulation, would substantially decrease the prices at which the aforesaid rights could be sold to the public, and would thereby impair and discourage TWA's efforts to obtain financing from sources other than the defendants, and would enable the defendants to continue to condition the furnishing of financing to TWA by defendants upon TWA's acquiring jet-powered aircraft only from defendant Toolco.

46. Defendants also warned the insurance companies and banks from which TWA was then attempting to ar-

range the immediate borrowing of $30,000,000 of short-term [30] funds and the borrowing of $147,000,000 of secured funds required for the purchase of the Boeing aircraft as hereinabove alleged, that the Voting Trust was invalid and that any such financing by them would be invalid. Such warnings were made by defendants maliciously and wilfully and with the intent and purpose of disrupting and discouraging TWA's efforts to obtain such financing. As a result of such warnings, at least one of the proposed lenders has completely withdrawn from all negotiations for the proposed financing, and TWA's efforts to obtain such financing have been handicapped.

47. In and since the month of May 1961, defendants and Atlas, with knowledge of the conspiracy and offenses hereinabove alleged, have demanded that TWA accept the proposed merger with Northeast on the terms previously directed by the defendants, which terms were and are not advantageous to TWA but which if consummated would be in the interests of the defendants and Atlas. The defendants have sought the merger on such terms for the purpose of increasing their total direct and indirect stock ownership in TWA and of increasing the number of aircraft to be supplied by them to TWA, by enlarging the business of TWA.

48. The stock of TWA acquired by defendant Toolco has thus been used by the defendants since December 31, 1960 in an effort to restrain, restrict and control TWA. Despite the existence of the Voting Trust, the defendants and Atlas have attempted to require TWA to obtain aircraft exclusively [31] from the defendants, to prevent TWA from obtaining aircraft essential to its business from Boeing, to prevent TWA from obtaining financing for the acquisition of such aircraft except on terms dictated by defendants, to require TWA to merge with another airline upon terms disadvantageous to TWA, to enlarge the defendants' indirect stock interest in TWA and to regain control over TWA and its entire business.

VIII.

Effects of Offenses

49. As the result of the offenses hereinabove alleged,

(a) Competition among aircraft manufacturers and others in the furnishing of aircraft by sale, lease or other means to TWA and other air carriers has been restrained and monopolized.

(b) Competition among aircraft manufacturers and others in the furnishing of jet-powered aircraft by sale, lease or other means to TWA and other air carriers has been restrained and monopolized.

(c) Competition among aircraft manufacturers and others in the furnishing of aircraft by sale, lease or other means to TWA has been restrained and monopolized.

[32] (d) Competition among aircraft manufacturers and others in the furnishing of aircraft by sale, lease or other means for use by scheduled air carriers between those cities in the United States, and between the United States and those foreign cities, between which points TWA provides the only scheduled air transportation by a United States-Flag air carrier, has been restrained and monopolized.

(e) Competition among aircraft manufacturers and others in the furnishing of aircraft by sale, lease or other means for use by scheduled air carriers between those cities in the United States, between which cities TWA provides more than 60% of the scheduled air transportation provided by United States-Flag air carriers, has been restrained and monopolized.

(f) Competition among United States-Flag scheduled air carriers and among all scheduled air carriers has been, is now being and will be injured.

(g) As a result of past, present and prospective injuries to the second-largest United States-Flag air

carrier operating outside of the United States, the national interest of the United States has been and is being injured.

50. TWA has been immediately injured in its business by Toolco's acquisition of TWA's stock, in that [33] TWA has been denied the right freely to acquire aircraft necessary to its operations and has received such aircraft as were made available to it in an untimely manner. TWA has further been immediately injured in its business by Toolco's denial to TWA of the authority or opportunity to acquire jet-powered aircraft from any person or corporation other than Toolco. Unless the relief TWA requests is granted, it will suffer further and irreparable injury.

51. TWA has been further and immediately injured in its business in that defendants have supplied TWA with aircraft, including jet-powered aircraft, essential to its business upon the condition that TWA accept such financing arrangements relating to such aircraft as the defendants chose to dictate, and further in that defendants have allowed TWA to procure financing essential for the acquisition of aircraft only upon the condition that TWA would accept such aircraft as the defendants dictated, and unless the relief TWA requests is granted TWA will suffer further and irreparable injury.

52. TWA has further been injured in the following manner:

(a) TWA was prevented from obtaining jet-powered aircraft and was deprived of opportunity for adequate use of jet-powered aircraft during the years 1958, 1959, 1960 and to date with a resultant loss in profits. That loss may be substantially increased as a result of defendants' continuing actions heretofore described.

[34] (b) TWA was foreclosed from the opportunity for early sales of its obsolescent piston engine aircraft, causing loss to TWA.

(c) TWA was foreclosed from obtaining financing on more advantageous terms than those available to it in December 1960 and thereby suffered a loss by virtue of the greater cost of borrowing it ultimately experienced.

(d) TWA's ability to obtain financing for its needs was substantially impaired.

(e) TWA's good will in its business of serving passengers throughout the world was diminished.

53. As additional results of the offenses hereinabove alleged, TWA further has been immediately and irreparably injured in that:

(a) TWA's ability to obtain debt and equity financing for its future financial needs has been seriously impaired.

(b) TWA's efforts to obtain both short-term and long-term financing for the purchase of the Boeing aircraft which it has contracted to buy have been seriously handicapped.

(c) TWA's ability to obtain both short-term and long-term financing for the jet-powered aircraft which it should order in the near future has been impaired.

(d) TWA's ability at this time safely to order additional jet-powered aircraft which it urgently needs has been handicapped.

[35] (e) The date when additional jet-powered aircraft will be available to and will be in use by TWA has been deferred.

(f) The period of disruption caused by the transition from non-jet to jet operation has been extended.

(g) The coordination of the change from non-jet to jet operations has been disrupted over an extended period of time.

(h) The management and business of TWA has been disrupted over an extended period of time.

54. As a result of the foregoing, TWA has been injured in its business and property in an amount estimated to be in excess of $35,000,000, and which amount may become substantially greater as a result of defendants' continuing violations as heretofore described.

55. TWA has no adequate remedy at law.

SECOND CLAIM

I.

Nature of Claim and Jurisdiction of Court

56. Plaintiff's claim arises from the violations by the defendants of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. In all other respects, the nature of the claim, the jurisdiction of the Court and the [36] descriptions of the parties and of the commerce involved are as hereinbefore alleged in Paragraphs 1 through 8 hereof and such Paragraphs are hereby realleged.

II.

Offenses Charged

57. Since on or about December 31, 1960 and continuing to the date of the filing of this complaint, the defendants, Atlas and others acting for each of them have been and are now engaged in a combination and conspiracy to restrain and monopolize and an attempt to monopolize a substantial segment of the interstate and foreign commerce of the United States in violation of Sections 1 and 2 of the Sherman Act, and defendant Toolco has used the stock of TWA acquired by Toolco so as to restrain commerce and tend to create a monopoly in a line or lines of commerce in violation of Section 7 of the Clayton Act.

58. Each act of the defendants and Atlas hereinafter alleged was done in furtherance of the offenses charged in Paragraph 57, was a part thereof and was done with the purpose and intent as hereinbefore alleged in Paragraph 10 hereof, and Paragraph 10 is hereby realleged.

III.

Background of the Offenses.

59. Paragraphs 11 through 35 hereof are hereby realleged as the background of the offenses charged.

[37]

IV.

Acts Committed

60. Paragraphs 36 through 48 hereof are hereby realleged.

V.

Effects of Offenses.

61. As results of the offenses hereinabove alleged, TWA has been immediately and irreparably injured as and in the manner hereinbefore alleged in Paragraph 53 hereof, and such Paragraph is hereby realleged.

62. If the defendants continue the offenses hereinbefore alleged and succeed in their purpose and plan, the further results and effects thereof will be those heretofore alleged as already having occurred in Paragraphs 49, 50, 51 and 53, and such results and effects are hereby realleged as prospective results and effects.

63. As a result of the offenses complained of, TWA has been injured in its business and property in a substantial amount which cannot be accurately calculated at this time. Such damages will, as a result of the defendants' continuing violations of the antitrust laws, be substantially increased in the very near future.

64. Unless the relief TWA requests is granted, it will suffer immediate, further and irreparable injury. TWA has no adequate remedy at law.

[38]

THIRD CLAIM

I.

Nature of Claim and Jurisdiction of Court

65. Plaintiff's claim arises out of the facts previously alleged in support of the claims hereinbefore stated, and this Court has jurisdiction to grant all relief available under such facts since this Court has jurisdiction, as hereinbefore alleged in Paragraphs 1 and 56, to determine each of the claims hereinbefore stated and arising out of the facts alleged.

II.

Description of Parties and Background of Acts Committed

66. The description of the parties involved is as hereinbefore alleged in Paragraphs 2 through 6 hereof and the background of the acts committed is as alleged in Paragraphs 29 through 35, and such Paragraphs are hereby realleged.

III.

Acts Committed

67. From and after December 31, 1960, the defendants have maliciously and wilfully injured the business of TWA by acts alleged in Paragraphs 37 through 48 hereof, which Paragraphs are hereby realleged.

IV.

Effects of Acts

68. TWA has been injured as and in the manner hereinbefore alleged in Paragraph 53, which Paragraph is hereby realleged.

TWA Complaint

[39] 69. TWA has been injured in the amount of approximately $10,000,000. Such damages will, as a result of defendants' continuing wrongful acts, be substantially increased in the near future.

70. Unless the relief TWA requests is granted, it will suffer immediate, further and irreparable injury. TWA has no adequate remedy at law.

PRAYER

WHEREFORE, plaintiff prays that this Court order, adjudge and decree:

I.

With Respect to the First and Second Claims Stated Hereinbefore,

(1) That the defendants and Atlas have violated Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton Act; and, with respect to the first claim only, Section 3 of the Clayton Act;

(2) That the defendants divest themselves of all right, title or interest in the stock of plaintiff;

(3) That the defendants pay to the plaintiff $105,000,000, three-fold the damages sustained by plaintiff, together with costs and attorneys' fees;

(4) That the defendants, their officers, agents, servants, employees, attorneys and all persons in active concert or participation with them who receive actual notice of this injunction be perpetually enjoined (a) from attempting to exercise control or domination over the activities of TWA, directly or indirectly, (b) from [40] threatening suit against TWA, its management or its directors either because of the failure of any of them to act in any manner sought by the defendants or because of the action of any of them in any manner not sought by the defendants, and (c) from

acquiring or holding any interest, beneficial or otherwise, direct or indirect, in the stock of plaintiff;

(5) That the defendants, their officers, agents, servants, employees, attorneys and all persons in active concert or participation with them who receive actual notice of this injunction be during the pendency of this suit enjoined (a) from attempting to exercise control or domination over the activities of TWA, directly or indirectly, and (b) from threatening suit against TWA, its management or its directors either because of the failure of any of them to act in any manner sought by the defendants or because of the action of any of them in any manner not sought by the defendants; and

II.

With Respect to the Third Claim Stated Hereinbefore,

(1) That defendants pay to plaintiff compensatory damages in the amount of $10,000,000, and such other and further punitive and exemplary damages as to this Court may seem just and proper;

(2) That the defendants, their officers, agents, servants, employees, attorneys and all persons in active [41] concert or participation with them who receive actual notice of this injunction be, at first during the pendency of this suit, and thereafter perpetually, enjoined (a) from attempting to exercise control or domination over the activities of TWA, directly or indirectly, (b) from interfering with any contract made and entered by TWA and from threatening suit against TWA, its management or its directors either because of the failure of any of them to act in any manner sought by the defendants or because of the action of any of them in any manner not sought by the defendants, and (c) from otherwise interfering with, obstructing or harassing TWA, directly or indirectly, in any activity done by TWA pursuant to the authority vested in its officers and directors; and

III.

That the plaintiff have such other and further relief as to this Court may seem just and proper.

Dated: New York, New York,
June 30, 1961.

CAHILL, GORDON, REINDEL & OHL

By /s/ JOHN T. CAHILL
John T. Cahill, Partner

By /s/ JOHN F. SONNETT
John F. Sonnett, Partner

Attorneys for Plaintiff
80 Pine Street
New York 5, New York

Toolco Answer and Counterclaims

[817]

[CAPTION] 61 Civ. 2324

Defendant Hughes Tool Company (hereinafter "Toolco") for its answer to the complaint and for its counterclaim herein states:

Answering the First Claim for Relief

1. Toolco denies each and every allegation of paragraphs 7, 9, 10, 22, 23, 24, 26, 36, 37, 38 and 44 through 55 inclusive of the complaint.

2. Toolco admits the allegations contained in paragraphs 2, 6, 25, 29, 30, 32, 33, 34 and 40 of the complaint.

[818] 3. Toolco admits that it is a corporation organized and existing under the laws of the State of Delaware and that it has assets of several hundred million dollars and except as so admitted denies each and every allegation of paragraph 3 of the complaint.

4. Toolco admits that Howard R. Hughes (hereinafter "Hughes") has been its sole stockholder from a time prior to January, 1939 to the present, that from a time prior to January, 1939 to December, 1960, he was an officer of Toolco, and except as so admitted denies each and every allegation of paragraph 4 of the complaint.

5. Toolco admits that Raymond M. Holliday has been for some years past, and now is, an officer of Toolco, that since 1959 he has been, and now is, a director of Trans World Airlines, Inc. (hereinafter "TWA"), and except as so admitted denies each and every allegation of paragraph 5 of the complaint.

6. Toolco admits that TWA has, since its organization in 1934, operated a domestic air carrier system between certain cities in the United States, that since 1946 TWA has operated an international air transportation system between the United States and certain cities in Europe, Africa and Asia, that during the period from 1958 through 1960, TWA purchased and leased jet-powered aircraft for amounts aggregating substantially in excess of $100,000,000, which aircraft were manufactured by manufacturers in various states in the United States, that in 1960 operating revenues of TWA were substantially in excess of $300,000,000 and net income after taxes in excess of $6,000,000, that in 1959, TWA provided the only scheduled air transportation between certain pairs of United States cities, and, except as so admitted, denies that [819] it has knowledge or information sufficient to form a belief as to the allegations of paragraph 8 of the complaint.

7. Toolco admits that commencing in or about the year 1939 and at various times thereafter it acquired common stock of TWA, that as at December 31, 1960, the amount of stock so acquired amounted to approximately 78.2% of such common stock, and except as so admitted denies each and every allegation of paragraph 11 of the complaint.

8. Toolco admits that commencing in 1958 jet-powered aircraft became one of the most important factors in the competitive operations of air carriers, and except as so admitted denies each and every allegation of paragraph 12 of the complaint.

9. Toolco admits that by 1955 aircraft manufacturers (including Boeing Airplane Company (hereinafter "Boeing") and Douglas Aircraft Company, Inc. (hereinafter "Douglas")) had prepared to the general knowledge of the air carrier industry plans and drawings and otherwise had undertaken preparations for the manufacture of jet-powered aircraft intended for use by air carriers, that many air carriers beginning in 1955 devoted substantial efforts to determining what, if any, jet aircraft they should

acquire and to obtaining jet aircraft suitable to their needs, that Boeing and Douglas contemplated and did ultimately manufacture jet-powered aircraft for long range and medium range flights, and except as so admitted denies each and every allegation of paragraph 13 of the complaint.

10. Toolco admits that General Dynamics Corporation, Convair Division (hereinafter "General Dynamics"), on its own account as one of the four major domestic aircraft manufacturers, commenced a program prior to 1955 for the design, development [820] and manufacture of a jet-powered transport aircraft designated the Model 18, that such program never proceeded past the preliminary design stage and was terminated in 1955 by General Dynamics, and except as so admitted denies each and every allegation of paragraph 14 of the complaint.

11. Toolco admits that prior to May 1, 1956, it considered the manufacture of a jet-powered aircraft with design and range characteristics suitable for use on both domestic and transatlantic routes, that Toolco contemplated that if it did manufacture this aircraft it would furnish the same to TWA and other air carriers, that it abandoned consideration of manufacture of such an aircraft prior to mid-1956, and except as so admitted denies each and every allegation of paragraph 15 of the complaint.

12. Toolco denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 of the complaint.

13. Toolco admits that in January 1956 Toolco entered into an agreement with Boeing for the purchase of eight Model 707-131 jet-powered aircraft with an option to purchase seven additional such aircraft, that in 1956 Toolco exercised its option to purchase such additional aircraft and also placed an order for eighteen long-range Boeing jet transports, and that in June of 1956 Toolco committed for the purchase of thirty Convair 880 aircraft from General

Dynamics, and except as so admitted denies each and every allegation of paragraph 17 of the complaint.

14. Toolco admits that purchase orders placed by Toolco with General Dynamics and Boeing gave Toolco the right to assign to TWA the right to acquire the jet-powered aircraft [821] ordered by Toolco, and that Toolco released six of the long-range Boeing jet transports on order in a transaction with Boeing and Pan American World Airways, Inc. which was recommended and approved by the management of TWA, and except as so admitted denies each and every allegation of paragraph 18 of the complaint.

15. Toolco admits that during the period 1956 to 1960 changes were made in the design and configuration of the Model 880 Convair aircraft ordered by Toolco and except as so admitted denies each and every allegation of paragraph 19 of the complaint.

16. Toolco admits that in the period 1959 and 1960 Toolco leased to TWA certain jet-powered aircraft on a day-to-day basis, that such aircraft were the only jet-powered aircraft flown on TWA's scheduled routes during said years, and except as so admitted denies each and every allegation of paragraph 20 of the complaint.

17. Toolco admits that on or about May 17, 1960, Northeast Airlines, Inc. (hereinafter "Northeast") submitted to TWA a proposed agreement for the merger of Northeast with and into TWA, that Northeast is a substantial air carrier operating under certificates of public convenience and necessity and serving the east coast of the United States and Canada, that upon information and belief in 1959 Northeast's revenue miles totaled 519,000,000 and its total assets exceeded $35,000,000, and except as so admitted denies each and every allegation of paragraph 21 of the complaint.

18. Toolco denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 27 of the complaint.

[822] 19. Toolco admits that subsequent to 1955 it discussed with various persons various proposals for the financing of jet-powered aircraft and except as so admitted denies each and every allegation of paragraph 28 of the complaint.

20. Toolco admits that as part of the arrangements with certain banks and insurance companies, Toolco, TWA and three Voting Trustees (Ernest R. Breech, Irving S. Olds and Holliday) executed an agreement dated as of December 15, 1960, which provided that the TWA stock owned and to be owned by Toolco would be placed in a voting trust (hereinafter "the Voting Trust"), and except as so admitted denies each and every allegation of paragraph 31 of the complaint.

21. Toolco denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 35 of the complaint.

22. Toolco admits that on or about May 31, 1961, it sent a telegram to Boeing that set forth certain positions of Toolco and except as so admitted denies each and every allegation of paragraph 39 of the complaint.

23. Toolco admits that TWA requested the Securities and Exchange Commission to accelerate the effective date of its Registration Statement to May 18, 1961, and that Toolco opposed such acceleration by reason of certain deficiencies in said Registration Statement, and except as so admitted denies each and every allegation of paragraph 41 of the complaint.

24. Toolco admits that pursuant to the direction of the Securities and Exchange Commission its counsel set forth in a letter to the Securities and Exchange Commission and TWA a statement as to the respects in which TWA's Registration Statement might be deficient, that in said letter [823] it was stated to be the position of Toolco that it was compelled to enter into the Voting Trust under con-

ditions which would warrant a termination of the Voting Trust otherwise than in accordance with the terms of the arrangements under which it was created, that it was further stated in said letter that Toolco had requested its counsel to investigate the possibility of enjoining the Boeing purchase transaction or of taking action on behalf of TWA against the persons responsible for any commitments incurred or damages suffered by TWA in connection with such program, and except as so admitted denies each and every allegation of paragraph 42 of the complaint.

25. Toolco admits that after TWA's Registration Statement had been twice amended subsequent to the sending of the aforesaid letter, the Securities and Exchange Commission accelerated the effective date of the Registration Statement as so amended so as to make the Registration Statement effective on May 24, 1961, and except as so admitted denies each and every allegation of paragraph 43 of the complaint.

Answering the Second Claim for Relief

26. Toolco denies each and every allegation of paragraphs 56 through 64, inclusive, of the complaint except in so far as such paragraphs reallege prior paragraphs of the complaint. As to such realleged paragraphs Toolco repeats to the same extent as if herein fully set forth each and every denial or admission which it has made with respect to the paragraphs so realleged.

[824]

Answering the Third Claim for Relief

27. Toolco denies each and every allegation of paragraphs 67 through 70, inclusive, of the complaint except in so far as such paragraphs reallege prior paragraphs of the complaint. As to such realleged paragraphs Toolco repeats to the same extent as if herein fully set forth each and every denial or admission which it has made with respect to the paragraphs so realleged.

AS A FIRST AND COMPLETE DEFENSE TO THE COMPLAINT AND EACH CLAIM FOR RELIEF ALLEGED THEREIN:

28. The complaint, and each of the claims for relief alleged therein, fail to state a claim upon which relief can be granted.

AS A SECOND AND COMPLETE DEFENSE TO THE COMPLAINT AND EACH CLAIM FOR RELIEF ALLEGED THEREIN:

29. The alleged facts set forth in the complaint do not constitute violations by Toolco of Section 1 of the Sherman Act (15 U. S. C. § 1 (1958)), of Section 2 of the Sherman Act (15 U. S. C. § 2 (1958)), of Section 3 of the Clayton Act (15 U. S. C. § 11 (1958)), or of Section 7 of the Clayton Act (38 Stat. 731, 15 U. S. C. § 18 (1946 Ed.)), and since plaintiff TWA and defendant Toolco are both Delaware corporations, this Court lacks jurisdiction over the subject matter of the action and over each of the claims for relief alleged in the complaint.

[825] AS AND FOR A THIRD AND COMPLETE AFFIRMATIVE DEFENSE TO THE COMPLAINT AND EACH CLAIM FOR RELIEF ALLEGED THEREIN:

30. Since both Toolco and TWA are Delaware corporations, the jurisdiction of this Court, if any, depends upon the alleged violations of the antitrust laws contained in plaintiff TWA's complaint.

31. Toolco is a corporation primarily engaged in the manufacture and sale of equipment for the oil well drilling industry. It has at no time manufactured commercial transports and its sole activities with respect to the sale or lease of aircraft to commercial airlines (except for the sale of two DC-6 aircraft originally acquired by Toolco for its own use) have arisen from its efforts to assist TWA in obtaining flight equipment adequate to its needs. It has at no time been in the business of selling or leasing any flight equipment to any airline and the only occasions on which

it has made equipment ordered by it available to any airline other than TWA have been when certain equipment ordered for the use and benefit of TWA has proved to be in excess of the needs or capabilities of TWA.

32. Toolco first acquired an interest in TWA in 1939 when the airline industry was in its infancy. By the end of 1942 it had acquired approximately 45% of the total outstanding shares of TWA. Thereafter, it acquired additional shares of TWA until it had acquired more than 78% of said shares.

33. The control of TWA by Toolco and the acquisition of more than 78% of the common stock of TWA by Toolco were subject to and approved by orders of the Civil Aeronautics Board (hereinafter "the Board") under Section 408 of the [826] Federal Aviation Act of 1958 (49 U. S. C. § 1378) or the identical provisions of Section 408 of the Civil Aeronautics Act of 1938. Section 414 of the Federal Aviation Act of 1958 (49 U. S. C. § 1384) exempts and relieves any person affected by any such order from the operation of the antitrust laws and of all other restraints or prohibitions made by or imposed under authority of law in so far as may be necessary to enable such person to do anything authorized, approved or required by such order.

34. The initial acquisition of a controlling interest in TWA by Toolco was approved by the Board, under Section 408 of the Civil Aeronautics Act of 1938, as consistent with the public interest, in an opinion and order dated October 17, 1944. Said order provided that such approval would be effective so long as commercial transactions between TWA and Toolco were limited to those involving complete items of property the price of which did not exceed $200 each, with the further limitation that the total annual expenditures involved in such commercial transactions by either party should not exceed $10,000.

35. In 1950 the Board approved under said Section 408 the further acquisition of control of TWA by Toolco sub-

ject to the same conditions contained in the aforesaid 1944 order. In so doing, the Board approved the exercise by Toolco of complete control over the business and affairs of TWA, including equipment and financing, and found that the continuing interest of Toolco in TWA appeared essential to the best interest of the carrier and the public.

36. Since the date of the Board's 1944 order no commercial transactions between Toolco and TWA have taken [827] place except as authorized by said order or except after a modification of said order upon a finding by the Board under said Section 408 that the proposed transaction was consistent with the public interest.

37. Toolco from the time of its initial acquisition of an interest in TWA has on various occasions assisted TWA in acquiring flight equipment adequate to its needs and in financing such flight equipment. TWA also acquired flight equipment directly from various manufacturers without assistance from Toolco. Orders of the Board specifically approved as not inconsistent with the public interest all transactions between TWA and Toolco with respect to the acquisition or financing of flight equipment.

38. The complaint does not allege any violation of the Federal Aviation Act of 1958 or of the orders of the Board under Section 408 thereof.

39. The only act alleged in the complaint with respect to the period prior to 1961 which was not specifically approved by the Board was a proposal that Northeast be merged with and into TWA. Such a merger proposal was, however, within the contemplation of the Board in approving control of TWA by Toolco. The merger proposal was, moreover, specifically conditioned upon the approval of the Board under the applicable provisions of the Federal Aviation Act of 1958, including Section 408 thereof, and upon approval by a majority of the stockholders of TWA other than Toolco voting at a meeting called to approve such a merger.

40. In December, 1960, as a result of the demands and unlawful activities of certain lending institutions and others, Toolco was compelled to place in a voting trust the [828] shares of common stock of TWA which it owned. By reason of such voting trust Toolco no longer controls TWA. All of the activities of Toolco alleged in the complaint with respect to the period subsequent to 1960 were taken on the advice of counsel for Toolco solely for the purpose of protecting Toolco's interests as beneficiary under said voting trust and as equitable owner of more than 78% of the stock of TWA.

41. By reason of the facts herein alleged, this Court lacks jurisdiction of the subject matter of the complaint and over the subject matter of each alleged claim for relief contained therein.

AS AND FOR A FIRST COUNTERCLAIM AGAINST TWA AND AGAINST ADDITIONAL DEFENDANTS THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, METROPOLITAN LIFE INSURANCE COMPANY, IRVING TRUST COMPANY, DILLON, READ & CO. INC., ERNEST R. BREECH AND CHARLES C. TILLINGHAST, JR.

42. Toolco is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Houston, Texas. All of its common stock is owned by Hughes, a leading aviator and aeronautical engineer who for many years has been interested in the development of commercial aviation in the United States.

43. Plaintiff TWA is a corporation organized and existing under the laws of the State of Delaware with its principal executive offices in the City of New York. TWA is and for many years has been the country's third largest domestic and second largest international air carrier. At all times hereinafter mentioned from 1947 to December, 1960, Toolco owned a majority of TWA's capital stock and nominated [829] a majority of TWA's directors. Since De-

cember, 1960 Toolco has been the equitable owner of in excess of 78% of the captial stock of TWA which stock was placed in a voting trust in December, 1960.

44. Additional defendants The Equitable Life Assurance Society of the United States (hereinafter "Equitable") and Metropolitan Life Insurance Company (hereinafter "Metropolitan") are corporations organized and existing under the laws of the State of New York with their principal places of business in the City of New York. Metropolitan is the country's largest insurance company with admitted assets of approximately $17 billion. Equitable is the country's third largest insurance company with admitted assets of approximately $10 billion. From 1947 to December, 1960 Equitable was the sole holder of TWA's senior indebtedness other than bank debt. At all times since December, 1960 Equitable and Metropolitan have been the holders of all such senior indebtedness of TWA.

45. Additional defendant Irving Trust Company (hereinafter "Irving") is a trust company organized and existing under the banking laws of the State of New York with its principal place of business in the City of New York. Irving is and for many years has been one of TWA's principal commercial bankers, has made loans and participated with other lending institutions in making loans to TWA and has undertaken on behalf of TWA to bring together lending institutions for the purpose of participating in loans to TWA. Irving for many years prior to 1961 maintained a similar banking relationship with Toolco.

46. Additional defendant Ernest R. Breech (hereinafter "Breech") is, upon information and belief, a citizen of [830] the State of Michigan. From December, 1960, until his resignation on or about January 26, 1962, he was one of the two voting trustees selected by Equitable and Metropolitan with respect to 5,221,301 shares of TWA's capital stock owned by Toolco which were placed in a voting trust in December 1960. Breech is and at all times since April

27, 1961 has been the Chairman of the Board of Directors of TWA.

47. Additional defendant Charles C. Tillinghast, Jr. (hereinafter "Tillinghast"), a citizen of the State of New York, is and at all times hereinafter mentioned since April 17, 1961, has been the president and chief executive officer of TWA.

48. Additional defendant Dillon, Read & Co. Inc. (hereinafter "Dillon Read"), on information and belief, is a corporation organized and existing under the laws of the State of New York with its principal place of business in the City of New York. Dillon Read is engaged in the investment banking business and is and since early 1959 has been the principal financial adviser to TWA.

49. This counterclaim is asserted pursuant to Rule 13(a) of the Federal Rules of Civil Procedure and arises out of the subject matter of TWA's claims herein.

50. In 1960 Equitable and Metropolitan, together with a group of commercial banks headed by Irving, demanded as a condition to their providing any financing to TWA that Toolco place in a lender-controlled voting trust prior to any default all shares of TWA stock which it owned. Such financing was required by TWA in order for it to acquire jet aircraft theretofore ordered by Toolco for the benefit of TWA. In order to insure that such needed jet equipment [831] would be acquired by TWA and for reasons which included the difficulty, if not impossibility, of obtaining such financing elsewhere, Toolco was compelled to yield to such demands but only upon the express agreement and understanding that:

(a) The Voting Trust would terminate upon the repayment of the obligations in connection with which it was created; and

(b) Toolco would have the right to terminate the Voting Trust by purchasing all such obligations at

the principal amount thereof together with accrued interest and, in addition, by paying to Metropolitan and Equitable a premium to be initially 22% of the principal amount of such obligations acquired by them.

51. Thereafter, in December 1960, pursuant to the aforesaid agreement Toolco, TWA, Equitable, Metropolitan, Irving and others entered into a series of transactions for the financing of the acquisition of the jet flight equipment ordered by Toolco for the benefit of TWA. In connection therewith and the purchase by Equitable and Metropolitan of $92,800,000 principal amount of TWA's 6½% Equipment Mortgage Sinking Fund Notes due December 31, 1972 (hereinafter the "Series A Sinking Fund Notes") and the borrowing by TWA of $72,800,000 from banks headed by Irving, which borrowing was evidenced by 6% Equipment Mortgage Serial Notes due December 31, 1961—December 31, 1964 (hereinafter the "Series A Serial Notes"), Toolco, TWA, Equitable, Metropolitan, Irving and others entered into a series of transactions and agreements by which the 5,221,301 shares of TWA's common stock were placed in the Voting Trust and Metropolitan and Equitable designated Breech and Irving S. Olds as two of the three voting trustees with [832] respect to said stock. By the terms of said agreements:

(a) Metropolitan and Equitable, as the holders of a majority in principal amount of the Series A Sinking Fund Notes and Series A Serial Notes, acting through Irving as agent for the lenders, have, and at all times since December, 1960, have had, the absolute right and power to remove the two lender-named voting trustees, or either of them, and to designate and remove from time to time the successor of either of said voting trustees.

(b) The Voting Trust is to continue, as to all shares of TWA beneficially owned by Toolco, for a period of 10 years from its inception, unless sooner

terminated in accordance with the terms of said agreements; and Toolco covenanted, so long as it should be the owner of any voting trust certificates, further to extend the Voting Trust, at the request of Irving as agent, for such additional period not exceeding the maximum period then permitted by the law of Delaware as should be specified in such request.

(c) The Voting Trust shall terminate (i) upon consent of Irving as agent acting at the direction of the holders of a majority in amount of the Series A Serial Notes and Series A Sinking Fund Notes, or (ii) upon cancellation and discharge of the Indenture of Mortgage securing said Notes, i.e., upon the payment or prepayment of said Notes, or (iii) upon the exercise by Toolco of an option to purchase, after December 31, 1961, all but not less than all of the Series A Sinking Fund Notes and Series A Serial Notes at a price equal to the [833] principal amount thereof plus accrued interest and, in addition thereto, a premium which is initially 22% of the principal amount of the Series A Sinking Fund Notes, namely, $20,416,000.

52. By reason of the agreements and transactions entered into in December, 1960, and the Voting Trust then created, Equitable and Metropolitan, together with other lending institutions including Irving, acquired and now possess control over the business and affairs of TWA. They have the right and power at any time to remove and select a successor to either or both of the voting trustees whom they have chosen. The majority voting trustees who are thus subject to their control in turn have the absolute right and power under the by-laws of TWA at any time to reconstitute TWA's Board of Directors without cause by altering the number of directors, by removing the entire Board of Directors at will, and subject to certain qualifications, by removing one or more directors. The majority voting trustees have used the power so given to them to

reconstitute TWA's Board of Directors and the members of said Board of Directors as presently constituted have been chosen in accordance with the wishes and with the approval of Metropolitan and Equitable.

53. Since the creation of the Voting Trust and the reconstitution of TWA's Board of Directors, TWA, Breech, Tillinghast, Irving, Metropolitan, Equitable and Dillon Read entered upon a course of conduct designed and calculated to prevent Toolco from regaining control of TWA, to perpetuate the Voting Trust and to interfere with the right of Toolco to terminate the Voting Trust in accordance with the rights of Toolco to terminate the Voting Trust in accordance with the terms of the agreements made in December 1960. Among the actions taken in furtherance of these objectives were the following:

[834] (a) In or about March, 1961, Breech selected Tillinghast to be TWA's president and chief executive officer. Prior to his selection Tillinghast had had no experience in the airline industry but he had acted as counsel for a corporation of which Breech was the chief executive officer. Upon information and belief, prior to his acceptance of the presidency of TWA, Tillinghast consulted with Breech and thereafter with representatives of Equitable, Metropolitan and Irving as to steps which could be taken to make it impossible for Toolco to terminate the Voting Trust and regain control of TWA in the foreseeable future and Dillon Read participated in conversations and suggestions as to how Tillinghast could be satisfied that Toolco would be unable to terminate the Voting Trust.

(b) Thereafter, TWA entered into an employment contract with Tillinghast pursuant to recommendations made by Breech. This contract provides that Tillinghast will be employed as TWA's chief executive officer for a minimum of five years upon terms such that upon his retirement or discharge at any time following the termination of the

Voting Trust (or upon his retirement at any other time after five years) he shall receive a pension for ten years, said pension being in the amount of $50,000 per year until he reaches age 65 and $30,000 per year thereafter. Tillinghast is now 50.

(c) Shortly after Tillinghast's election as president, TWA entered into agreements with Boeing for the purchase of additional jet aircraft from Boeing although, upon information and belief, the number of [835] such aircraft which TWA agreed to acquire is in excess of TWA's needs and financial capabilities. The aggregate cost of such jet aircraft and related equipment is in excess of $187,500,000. In order to finance such purchases, TWA through Dillon Read proposed to enter into agreements with Metropolitan, Equitable and the banking group headed by Irving to supply an additional $147,000,000 of senior debt. Metropolitan, Equitable and Irving agreed to supply such financing only upon terms designed and calculated to perpetuate the Voting Trust and to preclude Toolco from regaining control of TWA in accordance with the agreements made in December, 1960.

(d) In May 1961, Toolco learned of such proposed action between TWA and the lending institutions which control TWA. Toolco notified TWA, the voting trustees and the lending institutions of its concern at the self-dealing implicit in such negotiations. Toolco requested that it be informed as to the details of the contemplated financing of the Boeing purchases. TWA refused to furnish such information to it.

(e) Thereafter, in August 1961, TWA, upon information and belief, entered into agreements with Metropolitan and Equitable and with Irving and its associated banks, by the terms of which:

(i) TWA agreed to sell and Equitable and Metropolitan agreed to purchase, subject to cer-

tain conditions, an aggregate of $107,000,000 principal amount of additional sinking fund notes bearing interest at 6% and maturing on December 1, 1977 (hereinafter the "Series B Sinking Fund Notes");

(ii) Irving and the banking group which it [836] headed agreed to lend to TWA, subject to certain conditions, an additional $40,000,000 to be evidenced by additional serial notes bearing interest at 5½% and maturing serially from December 31, 1963 through December 31, 1966 (hereinafter the Series B Serial Notes);

(iii) As required by its agreements with Metropolitan, with Equitable and with Irving and its associated banks, TWA entered into a supplemental indenture by the terms of which the holders of a majority in principal amount of the Series B Sinking Fund Notes and Series B Serial Notes, namely, Metropolitan and Equitable, may demand payment from TWA of the principal of all said Notes ($147,000,000) together with accrued interest upon the happening of any of the following events, whether or not such events have come about or been effected by operation of law or pursuant to or in compliance with any judgment, decree or order of any court or any order, rule or regulation of any administrative or governmental body:

(a) the Voting Trust agreement shall have terminated for any reason whatsoever other than a termination by Irving as agent, prior to the payment in full of all the outstanding Series A Sinking Fund Notes and Series A Serial Notes at the voluntary request of the holders (other than Toolco or a Toolco affiliate) of a majority in amount of such outstanding Notes;

[837] (b) the rights of the holders (other than Toolco or affiliates of Toolco) of a majority of the outstanding Series A Sinking Fund Notes and Series A Serial Notes, acting through Irving as agent, to remove and fill vacancies in the office of the two voting trustees appointed by Irving as agent shall have terminated for any reason whatsoever other than a termination by the voluntary action of such holders of a majority of the Series A Sinking Fund Notes and Series A Serial Notes; or

(c) all the outstanding Series A Sinking Fund Notes and Series A Serial Notes shall be owned by Toolco or by any affiliate of Toolco, or by Toolco and any affiliate of Toolco.

Neither TWA nor any of the lending institutions sought or obtained the consent of Toolco to such agreements.

54. The employment contract between Tillinghast and TWA in so far as it requires TWA to pay to Tillinghast an annuity upon the termination of the Voting Trust whether or not in accordance with its terms is without consideration and represents a waste of the corporate assets of TWA.

55. The supplemental indenture into which TWA entered in August 1961, in so far as it permits the accelerations of the maturity of the Series B Sinking Fund Notes and the Series B Serial Notes constituted and constitutes unjustified self-dealing between TWA and those now in control of TWA, was and is contrary to and in violation of the agreements or obligations of TWA, Metropolitan, Equitable and Irving made or incurred at and prior [838] to the time the Voting Trust was created and constituted and constitutes an unjustifiable interference with the rights of Toolco to effect the termination of the Voting Trust in

accordance with said agreements. In connection with TWA's 1961 financing Dillon Read, upon information and belief, received substantial payments, the exact amount of which is presently unknown to Toolco.

56. Upon information and belief, TWA, Breech, Tillinghast, Metropolitan, Equitable and Dillon Read will, unless enjoined by this Court, continue to engage in a course of conduct designed and calculated to perpetuate the Voting Trust, to prevent its termination in accordance with its terms and to perpetuate the control of Metropolitan and Equitable and of Breech and Tillinghast over the business and affairs of TWA.

57. Additional defendants Breech, Tillinghast, Metropolitan, Equitable, Irving and Dillon Read are necessary parties in order that complete relief may be granted to Toolco.

58. By reason of the foregoing Toolco has suffered substantial damages and is threatened with irreparable injury.

59. Toolco has no adequate remedy at law.

AS AND FOR A SECOND COUNTERCLAIM AGAINST TWA AND AGAINST ADDITIONAL DEFENDANTS METROPOLITAN, EQUITABLE AND IRVING

60. Toolco repeats and realleges each and every allegation of paragraphs 42 through 48, inclusive, and 50 through 56, inclusive, hereof.

61. Jurisdiction of this Court arises from the violations of Section 408 of the Federal Aviation Act of 1958 (49 U. S. C. § 1378) herein alleged. Said Section 408 makes it unlawful for any person engaged in any phase of aeronautics to [839] acquire control of any air carrier in any manner whatsoever unless such acquisition of control is approved by the Board and further makes it unlawful for any such

person to continue to maintain control of any air carrier which has been acquired in violation of said Section 408.

62. At all times since 1955 Metropolitan and Equitable have been and are now persons engaged in a phase of aeronautics within the meaning of said Section 408 by reason of activities which include the following:

(a) Upon information and belief, at all times since 1955 the major airlines of the United States have been and are now dependent upon Equitable, Metropolitan and Prudential Life Insurance Company of America (hereinafter "Prudential"), the country's second largest insurance company, for long-term senior financing and said insurance companies have dominated, and now dominate, the supplying of such financing to the major air carriers of the United States. This dominance has arisen in part from the historic interest of said insurance companies in airline financing, in part from the recognition and enforcement of the traditional lender concept and in part from the vast amounts of financing required by the major airlines, particularly in connection with the acquisition of jet flight equipment. Upon information and belief, since 1955 none of the country's five largest air carriers have arranged any senior financing other than bank financing without the participation therein of one or more of said three insurance companies.

(b) Metropolitan is, and, upon information and belief, for many years has been, the country's largest supplier of financing to air carriers. As at December [840] 31, 1960 it held obligations of said carriers in a principal amount in excess of $288 million. Included in such obligations were those of four of the country's five largest air carriers, including TWA.

(c) Equitable is, and, upon information and belief, for many years has been, the country's third largest supplier of financing to air carriers. As at

December 31, 1960 it held obligations of said carriers in a principal amount in excess of $188 million, including obligations of TWA.

(d) As at December 31, 1960, Metropolitan held senior obligations of air carriers other than TWA in a principal amount in excess of $250 million and Equitable held such obligations in a principal amount in excess of $144 million.

(e) As at December 31, 1960, Metropolitan held in excess of 46% and Equitable in excess of 28% of the senior long-term debt of the country's five largest air carriers.

63. In December 1960 by the creation of the Voting Trust and the agreements made in connection therewith, Metropolitan and Equitable acquired control of TWA within the meaning of Section 408 of the Federal Aviation Act of 1958. Neither Equitable nor Metropolitan sought or obtained the approval of the Board pursuant to said Section 408 to such acquisition of control of an air carrier and Metropolitan and Equitable have continued to maintain and perpetuate their control of TWA without Board approval.

64. As more fully alleged in paragraph 53 hereof, in August 1961 Metropolitan and Equitable, together with Irving and its associated banks, agreed with TWA to supply [841] to TWA an additional $147 million of senior financing upon terms and conditions calculated to perpetuate the Voting Trust and the control of Equitable and Metropolitan over the business and affairs of TWA. No approval of the Board was sought or obtained to this further consolidation of control by Metropolitan and Equitable.

65. By reason of the facts herein alleged, the acquisition and maintenance of control of TWA by Metropolitan and Equitable through the Voting Trust and the consolidation of that control by giving to Metropolitan and Equitable the power to accelerate indebtedness of TWA upon termi-

nation of the Voting Trust was and is unlawful under Section 408 of the Federal Aviation Act of 1958 and the creation and continued existence of the Voting Trust was and is contrary to the public policy of the United States.

66. TWA, Equitable, Metropolitan and Irving are necessary parties to this second counterclaim in order that Toolco may be afforded full and proper relief hereunder.

67. Toolco has no adequate remedy at law.

AS AND FOR A THIRD COUNTERCLAIM AGAINST TWA AND AGAINST ALL ADDITIONAL DEFENDANTS

68. Toolco repeats and realleges each and every allegation of paragraphs 42 through 48, inclusive, 50 through 55, inclusive, and 62 hereof.

69. Upon information and belief, additional defendants James F. Oates, Jr. (hereinafter "Oates") and Harry C. Hagerty (hereinafter "Hagerty") are citizens of the State of New York; Oates is, and at all times hereinafter mentioned since 1955 has been, the president of Equitable and is and has been since said date in a position to determine or influence [842] its lending policies; Hagerty at all times hereinafter mentioned since 1955 until December 31, 1961 was the Vice Chairman of the Board of Directors of Metropolitan and was during such period in a position to determine or influence its lending policies.

70. Additional defendant Ben-Fleming Sessel (hereinafter "Sessel") is a citizen of the State of Connecticut. He is, and at all times hereinafter mentioned since 1955, has been the Senior Vice President of Irving and a director of TWA. He was originally nominated as a director of TWA by Toolco.

71. Toolco asserts this counterclaim derivatively in the right of TWA and its stockholders. It has made no demand upon the directors or the stockholders of TWA to bring this

claim for the reasons that the directors are under the domination and control of the additional defendants, that more than 78.2% of the stock of TWA is held in the Voting Trust, that a majority of the voting trustees of such stock are subject to the control of the additional defendants and that demand would be futile.

72. Jurisdiction of this Court over this counterclaim arises from the violations by the additional defendants of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1 and 2), and of Section 7 of the Clayton Act (15 U. S. C. § 18) hereinafter alleged.

73. The trade or commerce among the several States which is the subject matter of this counterclaim includes:

(a) The furnishing in interstate commerce by lending institutions of senior financing to the major airlines of the United States; and

(b) The furnishing in interstate commerce by [843] lending institutions of senior long-term financing to the major airlines of the United States.

74. The requirements of the major airlines for senior financing constitute and have constituted a separate and distinct market for lending institutions for reasons which include the following:

(a) The large amounts of moneys required;

(b) The large amounts of moneys required at a particular time; and

(c) The nature of the security for such financings, namely, jet and other aircraft which have a limited useful life and which may become obsolete in a relatively few years.

75. The requirements of the major airlines for long-term senior financing constitute and have constituted a separate and distinct market from the total requirements of the major airlines for senior financing for the reason that

banking institutions which have furnished a substantial portion of the senior short-term financing do not act as suppliers of long-term financing. As used herein, the term "long-term financing" means debt financing maturing more than five years from its creation and the term "short-term financing" means debt financing maturing within five years of its creation.

76. TWA constitutes and has constituted a substantial proportion of the market for the supplying of long-term and short-term financing to the major airlines of the United [844] States. For example, in 1960 Equitable and Metropolitan supplied to TWA $92.8 million in long-term financing and Irving and a banking group which it headed supplied $72.2 million in short-term financing and in 1961 TWA agreed to sell to Metropolitan and Equitable, and Metropolitan and Equitable agreed to purchase, an additional $107 million of long-term debt securities and Irving and, with one exception, the same banking group agreed to lend on a short-term basis an additional $40 million.

77. The violations of the antitrust laws hereinafter more fully alleged include the following:

(a) A combination and conspiracy to restrain interstate commerce by preventing TWA from acquiring (i) senior long-term financing from others than Equitable and Metropolitan except with the consent and acquiescence of Equitable and Metropolitan and (ii) senior short-term financing from others than Irving and such banking institutions as it permitted to participate in such financing, all in violation of Section 1 of the Sherman Act.

(b) A combination and conspiracy to attempt to monopolize and to monopolize a substantial segment of the interstate trade and commerce of the United States by attempting to monopolize and monopolizing the supplying of senior long-term financing to the major airlines of the United States, all in violation of Section 2 of the Sherman Act.

(c). An agreement in restraint of interstate trade and commerce of the United States, to refuse to supply financing to TWA or Toolco so long as TWA was, is or [845] shall be controlled by Toolco, all in violation of Section 1 of the Sherman Act.

(d) A combination and conspiracy to restrain interstate commerce by preventing TWA from obtaining long-term or short-term senior financing except at interest rates fixed in advance by agreement among lending institutions, all in violation of Section 1 of the Sherman Act.

(e) An agreement in restraint of interstate trade and commerce of the United States between and among lending institutions, including Equitable and Metropolitan and others, to the effect that (i) none of such lenders would supply financing to any major airline without the consent of the traditional senior lender to that airline, and (ii) in the event that the traditional senior lender to an airline refused to supply financing except upon particular terms, none of the other of such lenders would supply financing to that airline upon any terms, all in violation of Section 1 of the Sherman Act.

(f) The acquisition by Equitable, Metropolitan and other lending institutions, through voting trustees, of legal title to more than 78.2% of the capital stock of TWA, in violation of Section 7 of the Clayton Act.

(g) The refusal of Irving and the refusal of other lending institutions, whether acting alone or in concert, to extend credit to Toolco or Hughes except upon condition that Hughes as sole stockholder of Toolco, and Toolco as controlling stockholder of TWA, agree to grant to such lending institutions an exclusive market for [846] senior financing through the placing of Toolco's TWA stock in a lender-controlled voting trust, all in violation of Section 1 of the Sherman Act.

78. During the period from 1939 through 1955, Toolco through the use of its credit and resources, from time to time assisted TWA in the acquisition of piston-engined aircraft which TWA did not have the financial resources to acquire but which were necessary to enable TWA to maintain its competitive position on its authorized routes and to expand its operations pursuant to new authorizations of additional routes. In 1955 TWA and Toolco recognized that in order for TWA to maintain its competitive position it would require a fleet of jet-powered aircraft substantially as soon as its principal competitors and that orders for such equipment should not be delayed. TWA did not and would not have the financial resources or credit to order any jet aircraft prior to the end of 1958 at the earliest. Toolco, therefore, in 1956, in accordance with practices previously followed when the acquisition of needed aircraft was beyond TWA's then capabilities, used its own credit and resources to place orders for the acquisition of a fleet of jet aircraft from Boeing and General Dynamics for use by TWA. Prior to the execution of these contracts the type of equipment, the form of the contracts and the specifications of the aircraft were approved in detail by the operating and engineering personnel of TWA; and thereafter TWA's representatives supervised their manufacture, testing and delivery.

79. Toolco's total commitments in connection with TWA's jet equipment program exceeded $300 million. Toolco and TWA recognized that even if Toolco had desired to do so, [847] it could not supply permanent financing for such a fleet. By reason of the vast amount of financing required, such permanent financing could be accomplished only with the participation of one or more principal suppliers of long-term financing to the major airlines, namely Equitable, Metropolitan and Prudential.

80. By 1956 Equitable had established itself as TWA's traditional senior lender, holding $40 million in principal amount of TWA's 3¾% Equipment Mortgage Sinking Fund Bonds (hereinafter "the Sinking Fund Bonds")

due December 1, 1969. Upon information and belief, prior to 1956, lending institutions, including Metropolitan, Equitable and Prudential, entered into an understanding and agreement that (i) none of such lending institutions would supply financing to an airline except with the consent of the traditional senior lender to that airline and (ii) if the traditional senior lender to an airline refused to supply such financing except upon particular terms none of such lending institutions would supply financing on any terms. By reason of such agreement and understanding, Equitable's position as traditional senior lender to TWA made Equitable's support a necessity if the permanent financing of TWA's jet equipment program were to be accomplished.

81. Toolco discussed with Equitable in 1958 Equitable's requirements as to the permanent financing of TWA's jet equipment program. In such discussions Equitable indicated that:

(a) Since in Equitable's view, TWA's financial condition had not improved sufficiently so that TWA could independently finance the required jet fleet, Toolco would either have to supply a substantial [848] portion of such financing itself or be responsible for the obligations incurred by TWA;

(b) Equitable would require that as a condition to its participation in any TWA financing Toolco agree that Toolco's stock interest in TWA would be placed in a lender-controlled voting trust but only in the event of a default by TWA; and

(c) As a part of any financing TWA's Sinking Fund Bonds which Equitable held would have to be refunded.

82. The discussions with Equitable during 1958 were unsatisfactory to Toolco, primarily because Equitable did not appear prepared to participate in financing TWA's jet program unless Toolco assumed substantial permanent

obligations. In early 1959 Dillon Read was retained to prepare plans for the permanent financing of TWA's jet equipment program. Dillon Read advised Toolco and TWA that since Equitable was TWA's traditional senior lender, Equitable's support and participation was essential to the development of any permanent financing. Dillon Read further advised Toolco and TWA that under prevailing conditions an offering of equity securities by TWA would be inadvisable.

83. In view of the apparent difficulties to independent financing by TWA, Toolco, in cooperation with TWA, developed a plan for permanent financing through a leasing arrangement. Dillon Read undertook to and did develop a proposal for such an arrangement on terms which they presented as advantageous to TWA. TWA did not accept this proposal since Equitable would not support such a leasing plan.

84. Toolco had reason to believe that the public [849] acceptance of jet aircraft and the consequent improvement in the earnings of TWA would place TWA in a position independently to finance its jet equipment program. Early in 1959 Boeing commenced the delivery of jet aircraft ordered by Toolco. As such aircraft were received, they were placed in service by TWA under temporary leases pending permanent financing by TWA. TWA was thus enabled to place jet aircraft in transcontinental service substantially at the same time as one of its principal domestic competitors and considerably in advance of its other principal domestic competitor. After this early introduction of jet equipment TWA realized earnings before taxes in excess of $17.4 million in 1959 and in excess of $15.2 million in 1960.

85. Toolco financed the acquisition of jet aircraft leased to TWA out of its own cash resources until they were all but exhausted. Thereafter, such jet aircraft were financed largely through loans from Irving, TWA's and Toolco's lead bank, and other banks. Such loans were made avail-

able to Toolco until early in 1960. Although Irving informed Toolco in 1959 that it had exhausted its legal loan limit, its consents to subsequent loans continued to be required by reason of the terms of its existing loans. In 1959 Toolco advised Irving that such interim credit should not be terminated without giving Toolco adequate lead time either to arrange other interim credit or to consummate a plan for the permanent financing of TWA.

86. Upon information and belief, at some time in or about March 1960, the exact time being unknown to Toolco, Equitable, Irving and other lending institutions, Dillon Read and Oates, Sessel and others entered into an understanding and conspiracy (the persons who either at its inception or from [850] time to time thereafter joined such conspiracy being hereinafter called "the conspirators") to the following effect:

(a) Equitable and Irving would use their respective positions as traditional senior lender and lead bank to TWA and the conspirators would use all economic and other power at their disposal to obtain and maintain control of TWA for their mutual advantage, including the use of TWA as a market for the supplying of senior financing upon terms advantageous to the lenders.

(b) The conspirators would permit to participate in supplying senior financing to TWA only those whom they selected and would use their concerted efforts to prevent other lending institutions from participating in any TWA senior financing except with the consent of Equitable as to long-term senior financing and of Irving as to short-term senior financing and then only on terms satisfactory to Equitable and Irving.

(c) The conspirators would agree among themselves as to the interest rate to be paid by TWA for senior short-term and long-term indebtedness and would refuse to advance any financing to TWA ex-

cept after its acceptance of such predetermined interest rates.

In furtherance of said conspiracy and pursuant to said understanding the conspirators took the actions hereinafter set forth.

87. Following the refusal of Equitable to support a leasing plan, Toolco with the knowledge and assistance of TWA entered into negotiations with aircraft manufacturers for assistance in the financing of not only TWA's then planned [851] jet fleet but also of additions thereto. Irving learned of such negotiations early in 1960. Thereafter, Irving and other banks which had advanced money to Toolco, without prior notice to Toolco, advised Toolco on March 5, 1960 that they would no longer supply any short-term credit for the purpose of paying for further deliveries of jet equipment for TWA. The payment of rentals due from TWA to Toolco under the leases of jet aircraft by Toolco to TWA would have provided at least a partial alternative source of moneys to Toolco to be used in making payments for jets thereafter to be delivered. Equitable refused to permit TWA to make any such payments.

88. In March 1960, TWA and Toolco agreed to support a plan, later known as the "Dillon Read Plan", which contemplated that Equitable and one or more other insurance companies would supply permanent senior long-term financing, Irving and associated banks would supply short-term and interim senior financing to TWA and Toolco would accept $100 million of subordinated debt of TWA in payment, *pro tanto*, of TWA's obligations to Toolco and also establish a revolving credit in favor of TWA in the amount of $50 million. Equitable agreed to participate in such financing but only on condition that Toolco and TWA agree:

(a) To the acceleration of the maturity of $31,000,000 principal amount of TWA's Sinking Fund Bonds due in 1969 held by Equitable so that

such bonds would mature at the same time as the interim bank debt and to an increase in the interest rate on the Sinking Fund Bonds to that on the interim bank debt;

(b) To a guarantee by Toolco of the payment of said Bonds;

[852] (c) To the interest rate for the permanent financing supplied by the insurance companies being one-half of 1% greater than for the bank financing; and

(d) To the execution of an agreement which would provide that in the event of certain defaults, including a default as a result of a change of management, the TWA stock owned by Toolco would be placed in a voting trust controlled by the lenders.

Dillon Read advised Toolco that no alternative to the acceptance of the Dillon Read Plan and the requirements of Equitable appeared feasible. Relying upon this advice Toolco on or about March 28, 1960, agreed to accept said Plan and requirements.

89. Thereupon Irving on behalf of TWA undertook to form a banking group for the purpose of providing interim and short-term financing to TWA. Prior to Toolco's acceptance of the Dillon Read Plan, Dillon Read had advised Toolco and TWA that the interest rate on the permanent bank financing would be in the neighborhood of five or five and one-half per cent. Sessel, on behalf of Irving, advised TWA and Toolco that negotiations as to interest rate would have to await the formation by it of a banking group and represented to Toolco and to TWA that when a banking group was formed, Toolco and TWA would have a full opportunity to negotiate the interest rate. Thereafter, Metropolitan, after consultation with Equitable and with Equitable's approval, agreed to supply the portion of the long-term financing not being supplied by Equitable, and Metropolitan and Equitable agreed among themselves that the interest rate on such financing would be 6½%. Upon

information and belief, this interest rate was in excess of that on any other financing theretofore or thereafter supplied by Equitable to any other [853] corporation in 1961. When Irving formed its banking group, the members thereof, upon information and belief, after consultation with Equitable and Metropolitan, agreed among themselves and with Metropolitan and Equitable that the interest on the short-term financing would be 6%. Thereafter, Irving refused to negotiate or to permit Toolco or TWA to negotiate the rate of interest with the banking group which it had formed. Upon information and belief, Irving and Dillon Read in violation of their respective fiduciary obligations to TWA each concealed from TWA and Toolco that other commercial banks were interested in participating in such bank financing upon other and more favorable terms to TWA. By reason of such concealment and since no acceptable alternative to the Dillon Read Plan appeared feasible, TWA was compelled to accept the 6% interest rate on the bank financing and the 6½% rate on the insurance company financing.

90. In May 1961, Equitable and Metropolitan and Irving and its associated banks committed themselves to the Dillon Read Plan but under conditions which permitted them to withdraw their commitment in the event of a change in TWA's management. Prior to the making of this commitment Charles S. Thomas (hereinafter "Thomas"), TWA's then president, upon information and belief, had advised Dillon Read and other of the conspirators that he would remain as president of TWA only if he were given a substantial increase in salary and a lifetime retirement annuity. Although the conspirators, prior to committing themselves to the Dillon Read Plan, thus knew of Thomas's plans and the resulting uncertainty as to his tenure, neither Dillon Read nor any of the conspirators informed Toolco or TWA thereof until after Toolco without knowledge of Thomas's planned demands (i) had committed itself to the Dillon Read [854] Plan; (ii) had guaranteed interim loans to be made to TWA up to $40 million pursuant to an agreement between TWA and Irving and its associated

banks, said loans to be used by TWA for the jet equipment program and to repay existing bank loans; and (iii) had guaranteed the Sinking Fund Bonds of TWA held by Equitable, the maturity of which was accelerated to the same date as that of the interim bank financing. The maturity of such interim debt was fixed as the initial closing date under the Dillon Read Plan. The closing was originally scheduled for May 31, 1960 but was postponed to June 23, 1960 and thereafter, at the request of Equitable, to July 23, 1960.

91. On information and belief, prior to July 23, 1960, the precise date being unknown to Toolco, Metropolitan and Hagerty joined the conspiracy hereinabove alleged and, to insure the success thereof, the conspirators entered into a further agreement and understanding to the following effect:

(a) The conspirators, and each of them, would refuse to lend moneys to TWA or Toolco so long as Toolco controlled TWA;

(b) The conspirators, and each of them, would refuse to finance or otherwise deal with TWA or Toolco or Hughes except upon condition that Toolco place its stock in TWA in a lender-controlled voting trust;

(c) The conspirators would use their concerted efforts to obtain and maintain control of TWA and to foreclose all other lenders from the opportunity of supplying financing to TWA except with their consent.

92. Prior to July 23, 1960, but after Toolco was firmly committed to the Dillon Read Plan, after it had guaranteed $54,500,000 principal amount of TWA's indebtedness and [855] after loan agreements had been executed permitting the lenders to withdraw from their commitments in the event of a change in management deemed by them to be adverse, Thomas, upon information and belief, after con-

sultation with and with the knowledge and approval of the conspirators, for the first time demanded, on threat of resignation, a substantial increase in salary and a lifetime retirement annuity of $50,000 per year. Toolco refused to recommend to TWA the acceptance of such demands under pressure of the financing but itself offered Thomas equivalent benefits. Thomas insisted that his demands should be met by TWA and upon information and belief, was supported in said demands by the conspirators.

93. Thereafter, on July 21, 1960, Toolco advised representatives of the lending institutions that Thomas, having finished the two years of service to which he was committed, intended to resign. Toolco proposed to the lenders that the financing proceed as planned upon the understanding that if a president of TWA acceptable to the lenders had not been found within 90 days Toolco would place its TWA stock in a lender-controlled voting trust. Representatives of Metropolitan and Equitable tentatively accepted this proposal but it was thereafter rejected by the conspirators. Upon informtaion and belief, the decision to reject the proposal was made jointly by Oates and Hagerty. The conspirators thereafter refused to acquiesce in any plan which would permit Toolco to name the president of TWA. When a compromise between Thomas and Toolco appeared probable, Thomas consulted Oates and Hagerty. Upon information and belief, they advised Thomas not to accept any compromise but to resign. Thomas did so. Immediately upon his resignation the conspirators claimed that there had been an adverse change in TWA's management and, exercising the out which they had insisted be included [856] in the loan agreements, cancelled the lenders' commitments to TWA under said agreements.

94. Thereupon the conspirators entered upon a course of conduct designed and calculated to compel Toolco to place its TWA stock in a lender-controlled voting trust and to give to the conspirators control of TWA:

(a) The conspirators agreed to proceed with the Dillon Read Plan if, but only if, by September 1, 1960, Toolco placed its TWA stock in a voting trust prior to any financing. The maturity of the TWA debt which Toolco had guaranteed was extended to September 1.

(b) Irving insisted as a condition to its consent to the extension of the maturity of the interim bank debt that TWA accept no further deliveries of jet aircraft.

(c) Although Toolco repeatedly offered to recommend a president for TWA acceptable to the lenders and although Toolco proposed for their consideration several qualified executives and offered to consider any alternative suggestions the lenders might make, the conspirators refused to consider any of Toolco's proposals or make any alternative suggestions.

(d) Irving was requested by Toolco to formulate and implement a new financing plan which would not require Toolco to place its TWA stock in a lender-controlled voting trust. Irving through Sessel agreed with Toolco to use its best efforts to formulate such a plan. [857] During August and September, 1960, Irving represented to Toolco that it was diligently engaged in doing so. When Toolco sought to participate in negotiations and discussions which Irving represented were in progress, Irving further represented to Toolco that such participation would be inadvisable and did not permit Toolco to participate therein. By such representations, Irving led and induced Toolco to refrain from making any efforts to secure financing for TWA elsewhere or to obtain for itself financing required to repay its obligations to Irving and others incurred for the benefit of TWA.

(e) Upon information and belief, Irving refused to permit several large banks which were not a part of the Irving banking group as previously formed to participate in formulating and implementing a financing program although Irving knew that such banks were prepared to participate therein. Irving concealed from TWA and Toolco the willingness of such banks to participate in a banking group without a voting trust.

(f) The conspirators realized that any extended delay in the arrangement of permanent financing would cause a substantial delay in the delivery of Convair aircraft to TWA and that the damage which would result from such a delay created pressure upon Toolco and TWA to yield to their demands.

(g) Irving finally presented to Toolco a plan on September 26, 1960 (hereinafter "the Bankers' Plan"). Irving knew or should have known that the Bankers' Plan [858] as submitted could not be effectuated. The Bankers' Plan contemplated that General Dynamics would participate in the financing to the extent of $40 millon but as Irving knew or should have known General Dynamics did not have the available resources to extend a $40 million credit. Toolco accepted the Bankers' Plan in order to avoid the damage to TWA which would result from a delay in arranging financing for the Convair aircraft.

(h) General Dynamics sought to obtain the support of Prudential, its traditional senior lender, in order to supply the $40 million credit which the Bankers' Plan contemplated. Upon information and belief, Prudential consulted one or more of the conspirators and thereupon refused to give the required support. Toolco thereupon made arrangements to relieve General Dynamics of a substantial part of General Dynamics' commitment under the Bankers' Plan by itself supplying an additional $30

million to be realized through the liquidation of assets unrelated to TWA. It negotiated, prepared, executed and delivered to Irving a plan which was substantially identical to the Bankers' Plan except for this change.

(i) On October 6, 1960 Irving and its associated banks met, avowedly to consider Toolco's proposal. A representative of Equitable attended this meeting. Upon information and belief, prior to the presentation of Toolco's plan, Sessel advised the banks that Hughes had stated that a voting trust would be preferable to receivership and thereupon the banks agreed that they [859] would not consider Toolco's proposal and that in order to pressure Toolco and Hughes into a voting trust they would inform Toolco's representatives that. (i) no more loans would be made to TWA without an immediate voting trust agreement, (ii) the banks would proceed with the Dillon Read Plan if the insurance companies would also do so, (iii) should Toolco and Hughes not accept the Dillon Read Plan with a lender-controlled voting trust, Irving and the other banks would set off at the opening of business on October 7 deposit balances against outstanding loans to TWA and Toolco and (iv) the banks' decision was final, no more plans would be considered and Toolco and Hughes would have until 5:00 P. M. Eastern Daylight Saving Time to accept the banks' demands.

(j) In midafternoon Toolco's representatives were called into the meeting. Pursuant to the agreement theretofore made, Sessel, as spokesman, stated to Toolco that its proposal was totally unacceptable and refused to permit any discussion thereof. He further stated that the banking group would not agree to any financing plan for TWA which did not require Toolco to place its TWA stock in a lender-controlled voting trust. He demanded that before 5:00 P. M. EDT Toolco agree by written document

executed by its then president, Hughes, to accept the Dillon Read Plan with such a voting trust. He stated that if the demands of the banks were not met he would place Toolco in receivership. He further threatened that unless Toolco agreed to a lender-controlled voting trust he would collect summarily the substantial indebtedness owed to Irving [860] by Hughes personally which had no relationship to TWA or Toolco, which debt was not yet due but the maturity of which could be accelerated, and proceed immediately with a private foreclosure of Hughes' stock in Toolco which had been pledged as security for Hughes' debt to Irving.

(k) Prior to 5:00 P.M. Toolco acceded to the demands of Irving provided that TWA be given the right to refund without premium or penalty the senior indebtedness to be provided to TWA and that Toolco be entitled to purchase all such indebtedness at 100% of the principal amount plus accrued interest. Irving and the other banks agreed to such a provision and a representative of Equitable who was present at the meeting accepted it in principle.

(l) Thereupon Metropolitan after consultation with other of the conspirators demanded for the first time that Toolco's right to acquire the bank and insurance company debt and thus terminate the Voting Trust be subject to the payment of a penalty to be initially 22% of the principal amount of the insurance company debt, plus accrued interest, i.e., $20,416,000. This punitive and unprecedented demand was designed solely for the purpose of preserving the lender-controlled voting trust.

(m) Toolco promptly submitted to Equitable an alternative proposal which contemplated a voting trust but reserved to Toolco a right to purchase the senior notes for 100% of their principal amount plus accrued interest. In order to replace the participa-

tion of [861] Metropolitan and to reduce Equitable's participation to an amount not greater than its existing loan to TWA, Toolco, in this proposal, committed to take $67.3 million of the sinking fund notes. Although this proposal afforded the lending banks an improved security position, Irving peremptorily refused to consider the plan on the ground that it and its associated bank did not want to do business with Hughes.

(n) Thereafter, on October 19, 1960, Equitable and Metropolitan, with full knowledge of the pressure upon Toolco and TWA to accept any demands in order that Convair aircraft might be delivered to TWA as soon as possible, stated in identical terms to Toolco and TWA their willingness to reinstate the Dillon Read Plan, provided that (i) Toolco agree to place its TWA stock in a lender-controlled voting trust; (ii) Toolco consent to a penalty in the initial amount of 22% on $92,800,000 as a condition to termination of the Voting Trust by the refinancing of the loans to TWA; (iii) the by-laws of TWA (providing for reconstitution of the TWA Board of Directors by a majority of the stockholders at any time without cause) remain unchanged; and (iv) no employment contract be made with an executive officer of TWA providing for tenure of office beyond the date of the next annual election of officers. The additional demands thus made were designed and calculated to give to the conspirators the power to determine the management of TWA, including its chief executive officer, to reconstitute the Board [862] of Directors of TWA at will, and to manage and control the business and affairs of TWA in such manner as they should determine.

(o) Also on October 19, 1960, Irving made a similar proposal to TWA and Toolco. Irving stated (i) that acceptance of Metropolitan's and Equitable's proposals was a prerequisite to any commitment by

it, and its participating banks, and (ii) that in the event it, as agent for the other lending banks, did not have Toolco's unconditional agreement in writing to its proposal by October 21, 1960, Irving and the other lending banks would enforce their rights of collection of TWA's debts by all available remedies, including the right of set-off.

(p) Toolco received the October 19 letters on Friday, October 21. Toolco endeavored to negotiate a reduction of the 22% premium but the conspirators remained adamant. Thereupon, Toolco entered into an oral understanding with Irving that on Monday, October 24, a full quorum of TWA's Board of Directors would be asked to pass upon the financing after the Toolco nominee directors had been notified that they no longer could assume that they were being indemnified by Toolco. On the basis of this understanding with Irving, Toolco accepted the October 19 demands of the lending institutions.

(q) Irving refused to honor its agreement to permit TWA's full Board of Directors to consider the October 19 proposals. Toolco, therefore, on October 22, 1960, notified the lenders that it no longer considered [863] itself bound by its conditional acceptance thereof. Toolco also notified Irving that it would seek to find other sources of financing to replace Irving and its banking group. Thereupon Irving and certain members of said banking group commenced offsetting TWA and Toolco balances against TWA's debt to such banks. At the same time, widespread publicity was given in the press and otherwise to accounts of Toolco's withdrawal of its conditional acceptance of the October 19 proposals. Said accounts were false and misleading and calculated to injure the reputation of Toolco. Upon information and belief, such false and misleading publicity emanated from Irving and Sessel, was known to them to be false and misleading and was designed by them

to preclude TWA or Toolco from finding any source of financing for TWA's jet equipment program other than Irving and its associated banks and Metropolitan and Equitable and then only upon terms which included a lender-controlled voting trust.

(r) Thereafter, Toolco endeavored to develop an alternative plan for financing TWA's requirements. Toolco's efforts to develop such a plan were unsuccessful for reasons which included (i) the unwillingness of other lending institutions to finance TWA without the approval and support of Equitable, TWA's traditional senior lender, (ii) the control and domination by Metropolitan, Equitable and Prudential of the market for major airline financing, and (iii) the attitude of the financial community which was based on erroneous [864] assumptions of fact arising from the false and misleading statements of Irving and Sessel. Faced with no alternative by reason of the unlawful conduct of the conspirators, Toolco on November 30, 1960, committed itself to accept the lender-controlled voting trust, the additional demands of the conspirators and the Dillon Read Plan.

95. Thereafter, in December, 1960, the necessary transactions and agreements to effectuate the Dillon Read Plan, to place the common stock of TWA owned by Toolco in a lender-controlled voting trust, and to comply with the additional demands of the conspirators were effected. By the terms of such agreements, the conspirators acquired and now possess the power to control the business and affairs of TWA. In furtherance of the conspiracy hereinabove alleged the conspirators since December, 1960 have used the power so acquired:

(a) To install a management of TWA which is responsive to them rather than to the owners of TWA;

(b) To prolong and perpetuate their control of TWA by (i) prolonging and perpetuating the Voting

Trust and (ii) frustrating the option which they gave to Toolco in December, 1960 to regain control of TWA by acquiring, upon the payment of applicable penalties, all the Series A Sinking Fund Notes and Series A Serial Notes;

(c) To impose upon TWA commitments which extend beyond the term of the Voting Trust and which are not related to the repayment of the loans in connection with which the Voting Trust was created;

(d) To gain for themselves financial advantage [865] at the expense of TWA through making additional loans to TWA under conditions which are not competitive; and

(e) To maintain TWA as a captive market for additional senior financing.

Breech, notwithstanding the fiduciary duty which he owed to Toolco as the equitable owner of the 78.2% of TWA's stock which he held in trust, while serving as voting trustee and as Chairman of the Board of Directors of TWA has participated in the acts and course of conduct by which such objectives have been attained; Tillinghast who was elected president of TWA in the manner hereinabove alleged has furthered the efforts of the lending institutions to maintain control of TWA through the voting trustees; and Breech and Tillinghast joined the conspiracy hereinabove alleged.

96. Since December 1960, the conspirators have done or caused to be done the following in furtherance of said conspiracy:

(a) On February 28, 1961, TWA's Board of Directors was reconstituted so that a majority of said Board consisted of persons of the conspirators' choosing. Thereafter, on April 27, 1961, the TWA Board of Directors was further reconstituted by removing therefrom all directors who represented

the interests of Toolco, with the single exception of Holliday, the voting trustee named by Toolco. Breech caused himself to be elected chairman of TWA's Board of Directors as so reconstituted.

(b) The conspirators selected Tillinghast to be TWA's president and chief executive officer and, upon information and belief, at or about the time of his selection explained to him the nature of the conspiracy [866] and the contemplated course of conduct which would prevent Toolco from regaining control of TWA. The conspirators thereafter caused TWA to enter into a contract by which upon Tillinghast's retirement at any time following the termination of the Voting Trust and whether or not he has rendered any services to TWA (or upon his retirement at any other time after five years) he shall receive a pension for ten years, said pension being in the amount of $50,000 per year until he reaches age 65 and $30,000 per year thereafter, all as more fully alleged in paragraph 53 hereof.

(c) The conspirators have failed for reasons unrelated to any proper corporate or business purpose of TWA, to take advantage of opportunities to strengthen TWA's business. One of such opportunities which they have failed to pursue is that of a merger of Northeast into TWA. Because of TWA's route structure the traffic on its routes for many years has decreased sharply in the winter months. To remedy this seasonal imbalance Toolco in 1960 entered into negotiations with Atlas Corporation, the controlling stockholder of Northeast, looking toward a merger of Northeast with and into TWA. Northeast by reason of its east coast route to Florida has a sharp seasonal imbalance which is the reverse of that of TWA. Such negotiations, which were carried on with the knowledge of TWA, culminated in May, 1960 in an agreement of merger which Atlas Corporation and Toolco agreed to rec-

ommend to the Board of Directors of Northeast and TWA, respectively. Under the merger [867] agreement, the merger was subject to Board approval and to approval by a majority of the shareholders of TWA other than Toolco. Breech and Olds, with full knowledge of the agreement thus made by Toolco with Atlas Corporation, failed to recommend the merger to the TWA Board of Directors and the conspirators failed to take action to consummate a merger with Northeast either on the terms negotiated by Toolco or on other appropriate terms, notwithstanding the suggestion made by Toolco in May, 1961 that it was willing to discuss with TWA the possibility of Toolco's assuming any financial risk that such a merger might otherwise impose upon TWA and notwithstanding the recommendations of TWA's operating personnel that such a merger was in the best interests of TWA.

(d) For reasons unrelated to any interest of TWA, the conspirators refused to grant Toolco's request for a one week's postponement in an offering by TWA of $111,235,900 principal amount of subordinated debentures with warrants attached. This offering was being made to TWA's stockholders pursuant to agreements made in December, 1960 at the time of the creation of the Voting Trust. The purpose of the offering was to refund an interim note of $100 million which was accepted by Toolco in payment of obligations of TWA to it. By the terms of said agreements the entire proceeds of the offering would be paid to Toolco, which had agreed to purchase all unsubscribed debentures up to a principal amount of $100 million, unless Toolco exercised an option to subscribe to all the debentures to which [868] others did not subscribe. Toolco desired a postponement of the offering in order that it might make a simultaneous secondary offering of both the debentures which it was obligated to purchase and those which it had the option to purchase. Such a second-

ary offering would have permitted TWA to obtain an additional $11,235,900 in junior capital and Toolco to obtain $100 million in cash. Upon information and belief, the conspirators refused Toolco's request for a week's delay in order to prevent Toolco from obtaining cash resources which might be used to purchase the Series A Sinking Fund Notes and Series A Serial Notes and thus to terminate the Voting Trust.

(e) The conspirators entered into agreements with Boeing for the purchase of additional jet aircraft from Boeing, even though, upon information and belief, the number of aircraft which TWA agreed to acquire was in excess of TWA's needs and financial capabilities. The total cost of such additional jet equipment is in excess of $187,500,000 and a primary purpose of the conspirators in entering into this program was, upon information and belief, to create a need for additional financing for TWA upon terms which would perpetuate their control of TWA.

(f) Toolco made various proposals to TWA which would have provided additional capital to TWA. One of such proposals would have guaranteed to TWA an additional $100 million of equity capital and was conditioned solely upon the termination of the Voting Trust. The conspirators refused to entertain any [869] of such proposals upon their merits and rejected or allowed such proposals to expire without any negotiations with respect thereto.

(g) On June 30, 1961, the conspirators caused TWA to file its complaint in the instant action in which TWA seeks, among other relief, to divest Toolco of its interest in TWA.

(h) Thereafter, without the approval by or consultation with Toolco or approval by the other stockholders of TWA, the conspirators caused TWA to enter into agreements with Metropolitan, with Equitable and with Irving and its associated banks

for the supplying of $147 million of additional financing to TWA. As more fully alleged in paragraph 53 hereof, the conspirators in connection with said additional financing caused to be executed a Supplemental Indenture giving to Metropolitan and Equitable the right to accelerate the maturity of said $147 million of indebtedness in the event the Voting Trust were to terminate whether in accordance with its terms or otherwise or in the event Toolco were to exercise the option given to it in December, 1960, to acquire the Series A Sinking Fund Notes and Series A Serial Notes upon the payment of the applicable penalty.

97. During the years in which Toolco nominated a majority of the directors of TWA, namely from 1947 through 1960, the business of TWA grew steadily. From 1947 through 1960 TWA's operating revenues grew more than four times. In 1960 TWA had earnings before taxes in excess of $15,000,000. During the years from 1947 through 1960 TWA realized earnings [870] before taxes of $95,600,000.

98. By reason of the unlawful conspiracy and acts hereinabove alleged:

(a) TWA's jet equipment program was disrupted and the delivery of jet aircraft which had been ordered by Toolco from General Dynamics for the benefit of TWA was delayed;

(b) TWA has been compelled to obtain financing upon unfavorable terms and at higher interest rates than it would have otherwise had to pay;

(c) TWA's assets have been wasted;

(d) TWA has lost valuable opportunities;

(e) The business and affairs of TWA have steadily deteriorated.

Upon information and belief, TWA in 1961 lost in excess of $30 million without regard to accelerated depreciation on piston aircraft and before applicable tax credits, or an adverse change from 1960 in excess of $45 million. TWA's present management estimated in September, 1961 that by March, 1962 TWA, which started 1961 with a favorable cash balance of more than $40,600,000, would have a cash deficit of $2,500,000.

99. By reason of the foregoing, TWA has suffered and is continuing to suffer substantial damages in its business and property, the exact amount of which is presently unknown to Toolco but which is, upon information and belief, estimated to be in excess of $45 million, which amount may become substantially greater as a result of the conspirators' continuing unlawful activities.

100. TWA is threatened with irreparable injury.

101. All additional defendants are necessary parties [871] to this counterclaim in order that complete relief may be granted.

AS AND FOR A FOURTH COUNTERCLAIM AGAINST TWA AND AGAINST ALL ADDITIONAL DEFENDANTS

102. Toolco repeats and realleges each and every allegation of paragraphs 42 through 48, inclusive, 62, 69, 70 and 73 through 97, inclusive, hereof.

103. Jurisdiction of this Court over this counterclaim arises from the violations of the antitrust laws herein alleged.

104. Since the creation of the Voting Trust, TWA, under and by reason of the control of the conspirators over its business and affairs, has participated in the acts and course of conduct by which the conspiracy has been furthered, as hereinabove more fully alleged.

105. By reason of the facts herein alleged, Toolco has suffered and is continuing to suffer substantial damages in its business and property, the amount of which is presently estimated to be in excess of $77 million, which amount may become substantially greater as a result of the conspirators' continuing unlawful activities.

106. Toolco is threatened with irreparable injury.

107. TWA and the additional defendants are necessary parties to this counterclaim in order that complete relief may be granted.

108. Toolco has no adequate remedy at law.

[872] As and for a Fifth Counterclaim Against TWA and Against All Additional Defendants

109. Toolco repeats and realleges each and every allegation of paragraphs 42 through 48, inclusive, 62, 69, 70 and 78 through 97, inclusive, hereof.

110. Jurisdiction of this Court is ancillary to its jurisdiction over the third and fourth counterclaims heretofore alleged in that this Court has jurisdiction to grant all available relief upon the facts therein alleged.

111. During 1960 Equitable, Metropolitan, Irving, Hagerty, Oates and Sessel, together with others, entered into a conspiracy to deprive Toolco of its voting rights with respect to TWA stock owned by it and thus to deprive Toolco of control of TWA. They made their demands for a lender-controlled voting trust not for the purpose of protecting any legitimate interest which they might have as lending institutions but rather for the purpose of injuring, maliciously and wilfully, Toolco and Hughes. In order to coerce and compel Toolco to place its TWA stock in such a lender-controlled voting trust, they, acting in concert, took or caused to be taken the actions alleged in paragraphs 90 through 94 hereof.

112. After Toolco, by reason of the wrongful activities of the conspirators, had been coerced and compelled to place its 78.2% stock interest in TWA in the Voting Trust, Breech and Tillinghast joined in the conspiracy hereinabove alleged and since January 1961, the conspirators, acting in concert and in furtherance of the objects of the conspiracy, have engaged in a course of conduct designed and calculated to interfere with Toolco's rights as the equitable owner of over 78% of the stock of TWA, to maintain and perpétuate the [873] Voting Trust and the control over TWA which the conspirators unlawfully acquired, and to manage the business and affairs of TWA in the interests of the conspirators and not in the interests of the owners of TWA. TWA, under the control of the conspirators, has participated in said course of conduct and the acts in furtherance of the conspiracy more fully alleged in paragraph 96 hereof.

113. Among the objectives of the conspiracy has been the creation and perpetuation of a voting trust for a period beyond that permitted by applicable law. Under Section 218 of the Delaware Corporation Law the maximum term for which a voting trust of a Delaware corporation may be created is ten years and a voting trust may be extended for an additional term of ten years only in the last year of said voting trust and then only in the manner provided in said Section 218. The conspirators required that Toolco agree in December, 1960 to extend the Voting Trust at the request of Irving as agent for the holders of TWA's Series A Sinking Fund Notes and Series A Serial Notes for an additional term not to exceed the maximum permitted by Delaware law and since the creation of the Voting Trust have sought to perpetuate the Voting Trust as hereinabove alleged without the consent or acquiescence of Toolco.

114. As a result of the acts of the conspirators hereinabove alleged, Toolco has suffered damages in an amount presently estimated to be in excess of $77 million.

115. The continuation of the conspiracy herein alleged will result in irreparable injury to Toolco.

116. Toolco has no adequate remedy at law.

117. TWA and all additional defendants are neces-
[874] sary parties to this counterclaim in order that complete relief may be granted.

AS AND FOR A SIXTH COUNTERCLAIM AGAINST TWA

118. Toolco repeats and realleges each and every allegation of paragraphs 42, 43 and 50 hereof.

119. As a part of the transactions in December 1960 by which TWA's jet equipment program was financed, Toolco accepted TWA's interim subordinated note in the amount of $100 million and TWA agreed to refund said note from an offering of subordinated income debentures and to pay interest on said note at the rate of 6½% per annum to the date of refunding.

120. TWA refunded said interim note on June 13, 1961 but failed and refused to pay interest to the date of such refunding on the entire principal amount of said note.

121. The amount of such interest which TWA failed and refused to pay is $72,089.55 and such amount remains due and payable to Toolco by TWA.

Prayer for Relief

WHEREFORE, Toolco prays judgment dismissing the complaint herein and further prays that this Court order, adjudge and decree:

With Respect to the First Counterclaim

1. That Equitable, Metropolitan and Irving be perpetually enjoined from accelerating the maturity of any indebtedness of TWA by reason of the termination of the Voting Trust.

[875] 2. That the employment contract between Tillinghast and TWA in so far as it relates to the payment of any

pension or annuity be declared void and of no effect and that TWA be perpetually enjoined from paying any annuity or pension to Tillinghast thereunder.

3. That TWA, Breech, Tillinghast, Metropolitan, Equitable, Dillon Reed and Irving be perpetually enjoined from taking any action which is designed or would have the effect of preventing the termination of the Voting Trust in accordance with its terms.

4. That TWA, Breech, Tillinghast, Metropolitan, Equitable, Dillon Read and Irving account to Toolco for all damages suffered by Toolco by reason of the acts alleged in the First Counterclaim.

With Respect to the Second Counterclaim

1. That Equitable and Metropolitan have acquired control of TWA in violation of Section 408 of the Federal Aviation Act of 1958.

2. That Equitable, Metropolitan and Irving take all requisite action to terminate the Voting Trust.

3. That TWA recognize Toolco as the owner for all purposes of the shares of TWA's stock deposited in the Voting Trust and that Toolco is entitled to exercise all the rights of a stockholder of TWA with respect thereto.

4. That Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from accelerating the maturity of any indebtedness of TWA by reason of the termination of the Voting Trust.

[876]

With Respect to the Third Counterclaim

1. That the additional defendants have violated Sections 1 and 2 of the Sherman Act.

2. That Metropolitan and Equitable have violated Section 7 of the Clayton Act.

3. That the Voting Trust is invalid and void.

4. That TWA recognize Toolco as the owner for all purposes of the shares of TWA's stock deposited in the Voting Trust and that Toolco is entitled to exercise all the rights of a stockholder of TWA with respect thereto.

5. That Equitable, Metropolitan and Irving take all requisite action to terminate the Voting Trust.

6. That Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from accelerating the maturity of any indebtedness of TWA by reason of the termination of the Voting Trust.

7. That Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from refusing to deal with TWA while it is controlled by Toolco.

8. That the additional defendants be perpetually enjoined from interfering in any way with the exercise by Toolco of its rights as a stockholder of TWA.

9. That the additional defendants pay to TWA $135 million, three-fold the demages sustained by TWA, and pay to Toolco its costs, attorneys' fees and expenses.

With Respect to the Fourth Counterclaim

1. That TWA recognize Toolco as the owner for all purposes of the shares of TWA's stock deposited in the Voting [877] Trust and that Toolco is entitled to exercise all the rights of a stockholder of TWA with respect thereto.

2. That Equitable, Metropolitan and Irving take all requisite action to terminate the Voting Trust.

3. That Toolco may at any time acquire the Series A Sinking Fund Notes and Series A Serial Notes at the principal amount thereof plus accrued interest and without the payment of any premium or penalty.

4. That Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from accelerating the maturity of any indebtedness of TWA by reason of the termination of the Voting Trust.

5. That the additional defendants Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from refusing to deal with Toolco and with TWA while it is controlled by Toolco.

6. That the additional defendants pay to Toolco the sum of $231 million, three-fold the damages sustained by Toolco, together with costs and attorneys' fees.

With Respect to the Fifth Counterclaim

1. That TWA recognize Toolco as the owner for all purposes of the shares of TWA's stock deposited in the Voting Trust and that Toolco is entitled to exercise all the rights of a stockholder of TWA with respect thereto.

2. That Equitable, Metropolitan and Irving take all requisite action to terminate the Voting Trust.

3. That Toolco may at any time acquire the Series A Sinking Fund Notes and Series A Serial Notes without the payment of any premium or penalty.

[878] 4. That Equitable, Metropolitan and Irving, and each of them, be perpetually enjoined from accelerating the maturity of any indebtedness of TWA by reason of the termination of the Voting Trust.

5. That the additional defendants pay to Toolco damages in the amount of $77 million.

With Respect to the Sixth Counterclaim

1. That Toolco recover damages in the amount of $72,089.55 together with interest from and including June 13, 1961.

TOGETHER WITH Toolco's costs and disbursements and such other, further and different relief as to the Court shall seem just and proper.

Dated: New York, N. Y.
February 12, 1962.

/s/ CHESTER C. DAVIS

Chester C. Davis
Attorney for Defendant
Hughes Tool Company
120 Broadway
New York 5, N. Y.

[879]

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

RAYMOND M. HOLLIDAY, being duly sworn, deposes and says that he resides at Houston, Texas; that he is Executive Vice President of Hughes Tool Company, a corporation, defendant herein; and that he has read the foregoing answer and counterclaims and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to such matters believes them to be true.

/s/ RAYMOND M. HOLLIDAY

Subscribed and sworn to before me this
12th day of February, 1962.

/s/ DALLAS KELLER
Notary Public in and for
Los Angeles County, California.

My commission expires July 23, 1963

District Court Order, August 14, 1961

[408]

[CAPTION] 61 Civil 2324

MEMORANDUM

The motion of defendant Hughes Tool Company is hereby granted as follows: the taking of depositions pursuant to the plaintiff's notices served on August 1, 1961 shall be, and hereby are, stayed until defendant Hughes Tool Company shall have completed the taking of depositions pursuant to the notices which said defendant served on August 3, 1961.

By force of the understanding of counsel and Judge Dimock's order of July 7, 1961, the August 3, 1961 notices of said defendant are deemed to have been made between July 7, 1961 and July 20, 1961. On the other hand, by force of said understanding and order, plaintiff's August 1, 1961 notices are deemed to have been made after July 20, 1961, because said notices of plaintiff without leave of court would be permitted under F.R.C.P. Rule 26(a) only after [409] July 20, 1961.

Consequently, said defendant has priority in the taking of depositions under the general rule that, in the absence of some special and good reason, pre-trial examinations should proceed in the order in which they are demanded.

The dispositive issue is whether the record before the Court evidences special circumstances warranting a departure by this Court, in its discretion, from the general rule.

The Court has concluded that the plaintiff has not made such a showing. The Court will adhere to the general rule. So ordered.

As this memorandum-decision constitutes an order, no settlement is necessary.

/s/ WILLIAM B. HERLANDS
U.S.D.J.

August 14, 1961.

Pretrial Order, March 5, 1962

[1113]

[CAPTION] 61 Civ. 2324

PRETRIAL ORDER

A pretrial conference was held in this cause on February 23, 1962, wherein the following proceedings were had.

* * *

[1114]

II.

Counsel for all the additional defendants who appeared on this hearing have joined in an application that they be granted priority of deposition after the defendant Hughes Tool Company shall have completed its deposition of plaintiff Trans World Airlines.

[1115] This litigation is a complicated one. Plaintiff has asserted claims of violations of the antitrust laws against the defendants. Defendant Hughes Tool Company, by its answer, has asserted counterclaims against plaintiff and the additional defendants for alleged violations of the antitrust laws. The asserted damages on both sides can well exceed $500,000,000. At the outset of the litigation last summer defendant Hughes Tool Company obtained priority in the deposition-discovery procedures. The case was then assigned to me for all purposes pursuant to General Rule 2(b) of this court. On February 7, 1962 a pretrial order was entered scheduling the depositions to be conducted by the Hughes Tool Company. This schedule calls first for the testimony of the plaintiff and then for the testimony of twenty-one witnesses. Defendant Hughes Tool Company had not by that time served its answer, but this it did on February 13, 1962, the first day set for depositions. Eight of the designated witnesses were made additional defendants by virtue of the alleged counterclaims. The ninth additional defendant is the president of Trans World Airlines who is presently being deposed.

While the courts have adopted a normal rule of priority depending on time of service of a notice to take deposition, and the necessity for a defendant to obtain particulars of the charges leveled against him because of the notice form of pleading, such rules are not rigid in their application

and must yield in unusual circumstances [1116] to the ultimate goal of prompt, orderly and fair disposition of the litigation. Furthermore, the plaintiff who instituted the litigation must not be lost sight of in the maze that has resulted from the pleadings. The service of a notice to take depositions six months before answer cannot afford the defendant Hughes Tool Company the right of priority insofar as its counterclaims are concerned. Consequently, the schedule of depositions contained in the pretrial order of February 7, 1962 is amended as follows:

Defendant Hughes Tool Company may continue the depositions scheduled, limited, however, to evidence which bears on plaintiff's claims against Hughes Tool Company. Since a Special Master is presiding over the depositions on a day-to-day basis, he will see to the application of this limitation. Upon completion of this phase of defendant's depositions, the plaintiff shall proceed with its depositions in the order provided in the pretrial order of February 7, 1962. The additional defendants may participate in such depositions conducted by plaintiff, in furtherance of their own deposition proceedings, or may separately schedule such depositions to follow upon the completion of plaintiff's depositions. At the conclusion of the deposition proceedings by the additional defendants, the defendant Hughes Tool Company may then resume and complete its deposition proceedings.

III.

Arrangements shall be made by counsel for fixing [1117] a hearing date on motions to dismiss the counterclaims. Such hearing date shall be three days after the completion of the exchange of moving papers, answering papers and reply papers.

So Ordered.

Dated: New York, New York
March 5, 1962

/s/ Charles M. Metzner
Charles M. Metzner
U. S. D. J.

Pretrial Order, July 12, 1962

[1433]

[CAPTION] 61 Civ. 2324

PRETRIAL ORDER

A pretrial conference was held today on the respective appeals by the plaintiff and defendant Hughes Tool Company from rulings of the Special Master.

1. Defendant Hughes Tool Company appeals from a ruling of the Special Master overruling Toolco's objections to interrogatories propounded to it by plaintiff. After hearing counsel and reading the papers submitted in support of and in opposition to the appeal, the ruling of the Special Master is modified as indicated below and as modified is sustained.

[1434] Interrogatory No. 1 is modified by striking the words "or attorney". It is further modified by limiting any knowledge, information or belief of a director to such knowledge, information or belief which said director has acquired as a director of the defendant Toolco.

As to Interrogatory No. 4, the defendant need not make any answer thereto insofar as any of the named persons in this interrogatory are former employees or consultants. However, the defendant in its answer to this Interrogatory No. 4 shall indicate which of said persons are former employees or consultants. Insofar as consultants are concerned, the term shall embrace those persons who are in normal usage considered as independent contractors.

Interrogatory No. 7 refers to employees, agents and/or representatives of Toolco. The information requested by this interrogatory shall be furnished as to such persons only if those persons performed services of a personal nature or otherwise for Hughes individually and if such services were compensated for by the defendant and not by Hughes personally.

The dates referred to in the interrogatories shall be computed from the date of this order.

2. Plaintiff has appealed from a ruling of the Special Master denying the motion of the plaintiff for an order

determining that rule 4 of the Civil Rules of the United States District Court of the Southern District of New York is applicable in the instant case. After hearing [1435] argument of counsel and reading the papers in support of and in opposition to this motion, the appeal is disposed of as follows:

Irrespective of rule 4, the court has the power to vary any order heretofore entered fixing priority of deposition-discovery proceedings. In view of the number of days which the defendant Toolco has devoted to the deposition of Tillinghast, the president of the plaintiff, defendant is directed to complete that deposition on or before July 25th, 1962. It shall commence taking the depositions of the other noticed individuals immediately thereafter. Plaintiff may renew its motion before the Special Master on September 20th, 1962 if at that time it is advised that the depositions scheduled upon the completion of the Tillinghast deposition are not moving as expeditiously as possible, and that any further delay in the taking of the depositions of the defendant would be prejudicial to the plaintiff.

So Ordered.

Dated: New York, N. Y.
July 12, 1962

Charles M. Metzner /s
U. S. D. J.

Pretrial Order, January 10, 1963

[2489]

[CAPTION] 61 Civ. 2324

ORDER

[2490] A pretrial conference was held on January 9th, 1963 to consider various matters brought to the court's attention by notices of appeals from rulings of the Special Master. These matters are disposed of as follows:

1. The appeal by TWA, pursuant to a telephonic request, to review an order of the Special Master adjourning the deposition of Howard R. Hughes to February 11th, 1963 is withdrawn by counsel for TWA pursuant to an application filed January 8th, 1963.

2. The appeal by Hughes Tool Company dated January 3rd, 1963 seeking to review an order of the Special Master dated December 28th, 1962 denying Toolco's application to examine Ben-Fleming Sessel and the Irving Trust Company by Sessel and Arthur L. Wadsworth and Dillon, Read & Co. by Wadsworth is denied and the ruling of the Special Master is affirmed. The court adopts the statement of the Special Master appearing on page 11 of the transcript of proceedings before the Special Master dated December 28th, 1962, which states:

> "I do not think it [the depositions of Sessel and Wadsworth] would advance the proper administration of this case [2491] since it would in my judgment inevitably branch out into the issues of the counter-claims, or result in such continuous controversy as to the exact limits of such issues that it might interfere with the taking of Mr. Hughes' deposition at the time and place fixed."

The court has previously indicated that priority of deposition is not sacrosanct, and even without the adoption as of July 1st, 1962 of rule 4 of the Civil Rules of this district the court has the power to alternate the taking of depositions by the parties.

Pretrial Order, January 10, 1963

During a ten-month period the defendant has conducted over 80 days of depositions of the plaintiff, which have consumed over 10,000 pages of testimony. It will have substantially completed the deposition of the plaintiff this month with the testimony of Cocke and Leslie. It has then scheduled the depositions of other witnesses, including Sessel and Wadsworth, which can consume a very long period of time. The deposition of Howard R. Hughes by the plaintiff and the additional defendants should now go forward. This deposition was originally scheduled for September 24th, 1962 and then adjourned to October 29th, 1962. It has now been adjourned to February 11th, 1963 and this date will be adhered to in the absence of extraordinary circumstances. The complicated nature of this action necessitates long and involved deposition-discovery proceedings and it is only fair that plaintiff be allowed to proceed without waiting for the defendant to complete its deposition proceedings. This is especially true where the plaintiff claims that 75% of the proof necessary to sustain its claim is obtainable from Hughes personally.

[2492] Furthermore, the completion of such deposition will advance materially the date when the court could meaningfully entertain the various motions which Mr. Davis has indicated he would like to press for a dismissal of the complaint and for summary judgment. It will also facilitate an intelligent ruling upon Toolco's application pursuant to rule 16 of the Federal Rules of Civil Procedure and the sufficiency of TWA's compliance with interrogatories served on October 11th, 1962 and the further interrogatories served on November 13th, 1962.

The court concurs in the ruling of the Special Master contained in his order of December 28th, 1962 clarifying his order of October 25th, 1962, directing that Howard R. Hughes appear on February 11th, 1963 for deposition in Los Angeles. The return date of the subpoena served on September 6th, 1962 as adjourned by order of this court dated September 21st, 1962 and the notice to take deposition are adjourned to February 11th, 1963 at the same time and place. The provisions of the order of this court dated

September 21st, 1962 are reaffirmed and reiterated, and Mr Davis is directed to notify Howard R. Hughes of the directions of the court contained in this order by telephonic communication and by written communication to be made and sent by 5 p.m. on January 11th, 1963.

3. The motion by Hughes Tool Company, pursuant to rule 16 of the Federal Rules of Civil Procedure, to authorize the Special Master to conduct pretrial conferences, with recommendations to the court for the form and terms of a pretrial order defining and limiting the legal and factual issues in this case, is denied without prejudice to a renewal 30 days after the completion of the deposition of Howard R. Hughes.

[2493] 4. The appeal by Hughes Tool Company dated September 19th, 1962 from an order of the Special Master made on September 15th, 1962 which requires Hughes Tool Company to produce for inspection and copying by opposing counsel, prior to a further definition of the issues, the documents with respect to which Hughes Tool Company claims attorney-client privilege is denied and the order of the Special Master is affirmed.

A reading of the briefs and the oral argument would indicate that the application under advisement is in fact a reargument of the order of this court dated July 24th, 1962. At that time the court indicated that it had reviewed the opinion of the Special Master which appeared in the transcript at pages 4361-4391 and the letters of the Special Master dated May 2nd, 1962 and May 3rd, 1962. The court concurred with the opinion of the Special Master and directed that if there were any specific documents concerning which Hughes Tool Company desired specific rulings they should be submitted to the Special Master.

At pages 122 et seq. of the transcript of September 15th, counsel for the Hughes Tool Company stated that he had made available to the Special Master the documents concerning which the defendant was asserting the attorney-client privilege. Counsel went on to state that the docu-

ments were made available for a ruling by the Special Master not as to whether they would be normally covered by the attorney-client privilege, but "whether or not the attorney-client privilege had been waived." He then went on to say at page 124 that:

> [2494] "What is developing is simply the question of the procedure to be followed in obtaining rulings of the Special Master with respect to individual documents, applying the principles of law announced by the Special Master and affirmed by Judge Metzner, and the only area which I am aware constitutes a difference of opinion, perhaps, is whether those documents are to be produced at this time on the ground that prior to this time there had been a waiver of the privilege."

Documents heretofore submitted to the Special Master shall be made available to all parties by noon on January 14th, 1963. If there are any additional documents to which the defendant Hughes Tool Company asserts a non-waived attorney-client privilege, such documents shall be submitted for a ruling to the Special Master by noon of January 14th, 1963 and a list thereof furnished at the same time to counsel for all parties.

5. The appeal by TWA, pursuant to a telephonic request, to review an order of the Special Master denying its motion to quash or strike interrogatories served by Toolco on October 11th, 1962 is denied except that the order of the Special Master is modified to the extent that TWA shall answer the interrogatories within 60 days after the completion by TWA of its deposition of Howard R. Hughes. Objection to specific interrogatories shall be made to the Special Master within 55 days after the completion of the deposition of Howard R. Hughes.

6. The appeal by TWA dated December 20th, 1962 from an order of the Special Master appearing in the transcript of the proceedings before the Special Master on December 3rd, 1962 is denied except that the order of the [2495]

Special Master is modified to the extent that TWA shall answer the interrogatories within 60 days after the completion by TWA of its deposition of Howard R. Hughes. Objection to specific interrogatories shall be made to the Special Master within 55 days after the completion of the deposition of Howard R. Hughes.

So Ordered.

Dated: New York, N. Y.
January 10, 1963

Charles M. Metzner /s
U. S. D. J.

Special Master's Order Re Privilege

[9876]

[CAPTION]

MEMORANDUM OPINION AND ORDER

This matter was presented to the Special Master with extended argument and numerous briefs, all of which have been carefully considered. The issues now to be determined by the Special Master are the purpose and extent of the attorney and client privilege, whether such a privilege protects communications of an attorney while he is acting as a business agent on behalf of the client and how the privilege may be waived when it is recognized that certain evidence is privileged except for the fact that a waiver under the law [9877] has occurred.

Determination of these questions is now to be made as applied to certain documentary evidence in the custody, control or possession of the Hughes Tool Company claimed to be privileged because it involves communications between defendant and one or more of its several outside attorneys. Once determined in this proceeding, however, the principles of law as to when there is a privileged communication between attorney and client which precludes the production of documentary evidence subject to such privilege, and the manner in which the privilege can be and is waived shall apply to other parties to the litigation.

The facts concerning the various communications between the Hughes Tool Company and its outside counsel which the Tool Company now claims is privileged and further asserts that it is not required to produce for examination by the other parties to the litigation because of the attorney and client relationship, are not complicated. However, there are several aspects of the problem by reason of records in the hands of outside [9878] attorneys as well as those in the possession of the Tool Company that

make the case and the several evidentiary questions in issue, materially different.

First, Raymond Cook, one of the principal outside attorneys for the Tool Company for the period after 1955, has advised the Court that he may well have to be a witness in this proceeding and has already filed a lengthy affidavit sworn to as of November 22nd, 1961, in a proceeding now being heard before the Civil Aeronautics Board in what is called Tool Company-Northeast Control Case, Doc. No. 11620. A copy of that affidavit is attached to the affidavit of Thomas D. Barr, one of the attorneys for the additional defendants, Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, James F. Oates, Jr., and Harry C. Hagerty, and sworn to as of March 26th, 1962, and filed in this proceeding. The Cook affidavit consists of 40 paragraphs with a number of subparagraphs and is 22 pages long. It will not be necessary to go into the detail of the affidavit of Mr. Cook at this time, but we shall refer to it so that it [9879] may be examined at length by those who care to do so. I shall call attention to various parts of it later in this Opinion. It is apparent from the affidavit that although Mr. Cook was and is an attorney, he was stating information that came to him in connection with the financial business affairs of the Tool Company for an indeterminate period of years. He was also relating at length what he considered to be the facts concerning many matters and transactions in which the Tool Company was involved during the period described in the affidavit.

It is incumbent upon the Special Master to examine this affidavit with care to determine what portion of Mr. Cook's activities might have been privileged because of the attorney and client relationship if no waiver had occurred. It also has been necessary to decide what part of what he did involved acting as an ordinary agent, or as a business

agent on behalf of the client, and would not be properly within the privilege of attorney and client. We needed to ascertain the extent of the waiver that occurred by reason of the Tool Company authorizing the filing of the [9880] affidavit in question and its advising the Court that Mr. Cook was to be a witness in this case regarding a number of the important issues.

Determining the question at hand, it is also necessary to consider the affidavit of Raymond M. Holliday, Vice President, Secretary and Chief Financial Officer of the Tool Company which was sworn to on November 22nd, 1961, and filed in the same proceeding before the Civil Aeronautics Board, referred to above. In his affidavit, Mr. Holliday adopts the affidavit of Mr. Cook which I have referred to, both as to the facts and the conclusions. However, he adds additional assertions as to the facts in issue in this case.

In paragraph No. 4 of the Holliday affidavit, Mr. Holliday says: "It is inconceivable that Tool Co. which has an equity interest in excess of one hundred and forty million dollars in TWA, including debts in an amount in excess of eighty million dollars, would maliciously and willfully interfere with TWA's business. It has not done so. Rather it has acted on the advice of counsel to take steps which its counsel advised were required to protect its equitable right arising from [9881] its ownership in TWA." As indicated hereinafter, the Holliday affidavit and particularly paragraph No. 4 thereof has an important bearing upon the waiver question.

In the answer which the Hughes Tool Co. filed in this proceeding in the paragraph numbered 40, it said: "All of the activities of Tool Co. alleged in the complaint with respect to the period subsequent to 1960 were taken on the advice of counsel for Tool Co. solely for the purpose of protecting Tool Co.'s interest as beneficiary under said

voting trust and as equitable owner of more than seventy-eight per cent of the stock of TWA." This portion of the answer affects the question of whether any attorney and client privilege which might otherwise exist with regard to the period after 1960 has been waived.

The record shows that the named defendant Howard R. Hughes, who has not yet been served in this action, was not an officer or director of the Tool Company after the end of the year 1960. It has also been stated on the record a number of times and apparently is accepted by all of the parties that Mr. Hughes is the sole stockholder [9882] of the Hughes Tool Company. There is no showing that after the close of 1960 Mr. Hughes was authorized to act on behalf of the corporation in any capacity other than as its stockholder. There are numerous communications in question between Mr. Hughes and various outside counsel for the period starting with 1961, from the beginning of the year, and at least up to the time shortly before this litigation was instituted.

The affidavit of Mr. Cook is much too long to try to set it forth in detail in this opinion. However, a careful consideration of its purpose and what it purports to present as well as the various subjects delineated will be of help in the consideration of our problem.

It should be observed that Mr. Cook said that he was familiar with the "facts and circumstances" which he set forth and that he participated as counsel for the Tool Company in TWA's jet equipment program and the financing thereof from their inception. He then discussed what he referred to as "facts known to me." Paragraphs 17 through 33 deserve careful consideration as to the subject matter concerning which Mr. Cook said he was [9883] presenting facts on behalf of the Tool Company.

Some of the specific subjects covered were: the recognition by the Tool Company that if TWA were to maintain

its competitive position it would require a fleet of jet aircraft as soon as its principal competitors; advice that the Tool Company received from investment bankers and the necessity for TWA to have additional equitable capital in order for permanent financing to be accomplished. He then referred to discussions with Equitable concerning its requirements for the permanent financing for TWA and the fact that the Tool Company was not satisfied with these discussions. Further, there is the development of the plan for permanent financing through a leasing arrangement and the Tool Company's belief that TWA would be in a position independently to finance its jet equipment program.

He then referred to the Tool Company's negotiations with Irving and its agreement to support the Dillon Read plan. There is a reference to advice by Irving through Sessel and the Tool Company's decision not to seek or negotiate any interest rate until after Irving had formed [9884] a banking group. It is stated that representations were made to the Tool Company by Sessel and the Tool Company protested with respect to these representations, and when it was informed about interest rates, agreed to the interest rates but did not know that Irving had refused to permit other banks to participate in the plan. Mr. Cook also referred to Dillon, Read's advice to the Tool Company as to the interest rates. He made a statement concerning the lenders' commitment to the Dillon, Read plan and the Tool Company's guarantee agreement. He discussed the problem concerning Thomas's compensation and advice that the Tool Company gave to the lenders, as well as the various alternative suggestions for Thomas's successor and the fact that the Tool Company regarded the lenders' reliance upon Thomas's resignation in making their demands concerning management, as merely the use of an excuse to accomplish their objectives.

The affidavit then described the Tool Company's agreement to the financing plan in March 1960; advice that it received on August 1, 1960, from the lenders that they would insist on [9885] a voting trust; and finally that the Tool Company did agree in March 1960 to place its stock in a voting trust although it was unwilling to so agree under certain conditions. Then he referred to the Tool Company position as to demands made by the lenders and its request to Irving to develop an alternate plan. He asserted Irving's representation to the Tool Company concerning its inability to develop such an alternate plan and its refusal to permit participation by other banks, although this was unknown to the Tool Company.

Other paragraphs of the affidavit described the ability of Irving to apply economic pressure on the Tool Company and Irving's presentation to it, of the bank plan. He related the Tool Company's doubts about General Dynamics' ability to participate in the plan, how those doubts were confirmed and the protests that were made to Irving. Then he went into the Tool Company's presentation to Irving of its own plan, the bank meeting of October 6, 1960, and finally the Tool Company's accession to Irving's demand on certain conditions.

[9886] The affidavit related how the first time that demand was made upon the Tool Company by the Metropolitan Life Insurance Company that the Tool Company's right to terminate the voting trust be subject to a penalty and that the Tool Company promptly submitted to the Equitable an alternate proposal and Irving then refused to participate in the alternate plan. He stated that after this both Equitable and the Metropolitan indicated their willingness to reinstate the Dillon, Read plan provided the Tool Company met the additional demands and Irving made a similar proposal to the Tool Company.

Mr. Cook then described how the Tool Company endeavored to negotiate a reduction of the premium after it re-

ceived the October 19th letters and finally made an oral agreement to accept the lenders' demand subject to the understanding with Irving that it be submitted back to the Board of Directors, and Mr. Sessel's account of that understanding which Mr. Cook claims were incorrect. Thereafter, the Tool Company proceeded to cancel its commitment.

He related that the Tool Company made a further effort to develop a new plan for financing [9887] and upon failure of that, the 1960 financing was consummated.

Mr. Cook then developed the position that the Metropolitan and Equitable acquired and maintained control of the business and affairs of TWA, the Tool Company's expectations on the interest rate, and finally the lenders' demand that the Tool Company turn over control of TWA to them upon terms calculated to perpetuate the control that they had achieved.

Upon a consideration of the detail of the affidavit, it is apparent that it purports to be based on information which Mr. Cook received as counsel of the Tool Company. It is also obvious that it deals with that company's state of mind, position, attitudes and agreements with third parties as well as representations which he stated such third parties made, concerning the matters described in the affidavit. In many respects the affidavit parallels the allegations in the answer and counterclaims.

[9888] The applicable law involves a variety of legal principles. First, it should be recalled that this is not an action which depends upon diversity of citizenship for the Federal Court to have jurisdiction. The right to recover treble damages and obtain an injunction for violation of the Antitrust Laws is one that is created by the Federal Statute and did not exist at common law. See United States vs. Addyston Pipe and Street Company, 85 Fed. 271, 6th Cir. 1898; Standard Oil Company of New Jersey vs. United

States, 221 US1, 1911; and Apex Hosiery Company vs. Leader, 310 US 469, 1940. For this reason we do not have the problems relating to the distinction between substantive procedural statutes and rules of law, which must be dealt with in diversity cases under Erie vs. Tompkins, 304 US, 64. However, even in a diversity case, Federal Courts have held that they are not precluded from deciding that a statutory privilege need not be allowed. Monarch Insurance Company of Ohio vs. Spack, 281 Fed. 2nd 401, 5th Cir. (1960) and Humphries vs. Pennsylvania Railroad Company, 14 F.R.D. 177 US District Court, N.E. Ohio E.D. (1953) where it is said: "The con- [9889] clusion is sound that the Federal Courts are warranted to view the problems pertaining to the attorney-client privilege in the light of the law of the Federal Court rather than the law of the State where the litigation occurs." Professor Moore has taken substantially the same position in his work at 2 Moore's Federal Practice, First Ed. 2641.

A symposium on "The Lawyer-Client Privilege": Its Application to Corporations, The Role of Ethics, and Its Possible Curtailment, reported in the Northwestern University Law Review Vol. 56 May and June 1961, No. 2 at pages 235 to 262 presents a careful statement of the basis for the attorney-client privilege as it exists in the law. There it is said: "There is, perhaps, no principle of law which exists on a sounder basis, or which is supported by a more uniform chain of adjudication, than that which holds all information acquired by an attorney from his client, touching matters that come within the ordinary scope of professional employment, as privileged communications."

This symposium recognized that the purpose of [9890] the rule was to encourage the placing of full confidence in the attorney without fear of the disclosure of the secrets entrusted. It found that there were certain required conditions if documents or testimony were to come within the rule. They are:

(1) that a professional relationship be established between the client and its legal advisor;

(2) that the communication must be confidential and not made simultaneously to third parties or be intended to be communicated to third parties;

(3) the communication must be relevant to the advice sought and

(4) the circumstances must indicate that it was intended to be confidential and

(5) the privilege does not encompass information gleaned from sources other than the client or his authorized agent even though acquired by the attorney in the course of professional employment.

The attorney-client privilege covers the action of the attorney as legal advisor. It does [9891] not extend to communications between directors, officers, or agents of different corporations, or to negotiations between such corporations which are made or conducted by men who happen to be members of the bar. Nor does it extend to communications made by a client to his attorney with the understanding that the information is to be imparted to a third party.

The privilege does extend to communications to or from lawyers where the documents were prepared to solicit or give an opinion, on law or legal services and such parties [sic] of them are privileged as contained or have opinions based on information furnished by an officer or employee of the corporation in confidence and without the presence of third persons. Radio Corporation of America vs. Rauland Corporation 18 F. R. D. 440, U.S. District Court N. D. Illinois, E.D. (1955) and United States vs. United Shoe Machinery Corporation 80 F. Supp. 357, United States District Court D. Massachusetts, (1950).

As stated by Judge Irving R. Kaufman while a District Judge in Commercio E. Industria Cont. vs. Dresser In-

dustries, 19 F. R. D. 513, U. S. District [9892] Court S. D. New York, (1956) "The privilege should certainly not be extended to communications between an attorney and his client pertaining to the attorney's negotiations with a third party over terms and details of business transactions. In applying this principle to the facts before him, Judge Kaufman further said, "While Mr. Schwartz is a reputable lawyer, of many years standing, due to the exigencies of the situation—the client being in Brazil and the parties to be negotiated with being in the New York area—he was called upon to perform the proper, practicable and convenient task of acting as the clients' alter ego in these business transactions. In this age of high finance and international commercial transactions more and more are lawyers called upon because of their integrity and business acumen to assist clients in their business dealings. Judge Levet previously rejected plaintiff's contention that the attorney-client privilege was applicable to this situation when he denied an application to vacate a notice by the defendant Dresser to examine Mr. Schwartz (citing the authority). "For the reasons stated earlier I fully concur with Judge Levet's conclusion."

[9893] When it is found that the relationship between the attorney and the client meets all of the other requirements and does not involve action as a business negotiator or a present disclosure or contemplated future communication to third persons there remains the further question of whether or not there has occurred a waiver either in specific terms or by implication. Professor Wigmore in his treatise on evidence examines the question of waiver, in a number of its aspects.

In Section 2327 of the 1961 Edition at page 634, he asks the question, "What constitutes waiver by implication?" He then answers: "Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, that is, not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not

to abandon could alone control the situation. There is always the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended [9894] that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or disclose, but after a certain point his election must remain final.

"(2) The client's offer of the attorney's testimony in the cause at large is not a waiver so far as the attorney's knowledge has been acquired casually as an ordinary witness but otherwise it is a waiver for, considering that the attorney ought in general not to be used as a witness (Section 1911 Supra), the client ought to be discouraged from utilizing his attorney in double and inconsistent capacities; and if he has seen fit to furnish him knowledge as a witness, he should deny himself the right to invoke the attorney's function as an advisor.

"(3) The client's offer of his own testimony as to specific facts about which he has happened to communicate with the attorney is not a waiver, for the same reason as in paragraph (1) Supra. But his offer of the attorney's testimony as to such specific facts is a waiver for the same reason as in paragraph (1) Supra.

[9895] "(4) The client's offer of his own or the attorney's testimony as to a specific communication to the attorney is a waiver as to all other communications to the attorney on the same matter. This is so because the privilege of secret consultation is intended only as an incidental means of defense, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former.

"(5) The client's offer of his own or the attorney's testimony as to part of any communication to the attorney

is a waiver as to the whole of that communication on the analogy of the principle of completeness, (citing Section 2113 Supra).

In Section 2328 of the same treatise, Professor Wigmore deals with waiver at a former trial. He says under waiver by joint clients, agents, assignees, "(1) A waiver at one stage of the trial should be final for all further stages, and a waiver at a first trial should suffice as a waiver at a later trial since there is no longer any reason for preserving secrecy."

These principles have been followed in this [9896] District in a number of decisions. Knaust Bros. vs. Goldsclagg, D. C. S. N. Y. 1939, 34 Federal Supp. 87; Munzer vs. Swedish-American Line, D. C. S. N. Y. (1940) 35 F. Supp. 493; and Wild vs. Payson (1946) 7 F. R. D. 495, 500.

Wigmore's position as to the proposition that the privilege is not divisible has also been applied a number of times in this District. It is stated in the case of In re Associated Gas & Electric Co., 59 F. Supp. 743, D. C. S. N. Y. (1944), in the following terms: "The petitioners having waived as to some of the letters relating to a specific subject open the door to all the privileged correspondence between it and its attorney on that specific subject. The Court cites for that proposition Hunt vs. Blackburn, 128 U. S. 464. White vs. Thacker, 5 Cir., 78 F. 862; Western Union Telegraph Co. vs. Baltimore & Ohio Tel. Co., D. C. 26 F. 55; Kunglig, Jarnvagsstyrelsen vs. Dexter and Carpenter, 2 Cir., 32 F. 2nd 195; and People ex rel Brownell vs. Higgins, 96 Misc. 485, 160 N. Y. S. 721. To like effect see United States vs. Pellier, 255 F. 2nd 441, 2 Cir. (1958) and cases cited therein.

Furthermore, once the waiver is made as [9897] Professor Wigmore says, it is general and it cannot be made special so as to be limited to a particular purpose or a particular person. See People vs. Bloom, 85 N. E. 824. The

reasoning supporting this principle is developed at some length in the case of McKinney vs. Grand Street P. P. and S. R. Co., 10 N. E. 544 where the Court said: "It is claimed by the appellant that the ban of secrecy having once been removed by the patient and the information having lawfully been made public the right to object further thereto had not been conferred. There seems much reason in this claim. The patient cannot use this privilege both as a sword and a shield,—to waive when it innures [sic] to your advantage and wield when it does not—after the publication, no further injury can be inflicted upon the rights and interests which the statute was intended to protect, and there is no further reason for its enforcement. The nature of the information is of such a character that when it is once divulged in legal proceedings, it cannot be again hidden or concealed. It is then open to the consideration of the entire public, and the privilege of forbidding its repetition is not conferred by the [9898] statute. The consent, having been once given and acted upon, cannot be recalled, and the patient can never be restored to the condition which, from motives of public policy, requires suppression of such information."

There seems to be no question but what it is the duty of the Court to examine the documents if there is a genuine dispute as to whether the privilege is applicable and determine the question. See Ellis-Foster Co. vs. Union Carbide & Carbon Corp., 159 F. Supp. 917B (D. N. J. 1958); International Min. and Chemical Corp. vs. Golding-Keene Co., 162 F. Supp. 137 (W. D. N. Y. 1958); Zenith Radio Corp. vs. Radio Corporation of America, 121 F. Supp. 792 (W. D. Del. 1954); Bruun vs. Hanson, 30 F. Supp. 602 (W. D. Idaho 1939); Radio Corporation of America vs. Rauland Corp., 18 F. R. D. 444 (N. D. Ill. 1955).

It also appears to be well established that the burden of proving that any communication is privileged is upon the person who asserts the privilege. Humphries vs.

Pennsylvania Railroad Co., 14 F. R. D. 177, (U. S. D. C. N. D. Ohio 1953) where it is said: It is indisputable that one who claims a privilege has the burden of establishing affirma- [9899] tively that the matters for which he claims the privilege fall within its coverage." See also Mowell vs. Van Buren, 77 Hun. 569 (3rd Dept. 1894); Banker's Money Order Ass'n. vs. Nachod, 120 App. Div. 732 (1st Dept. 1907); Matter of Morrell, 154 Misc. 356 (Surr. Kings Co. 1935).

Applying these principles to the facts in the case we find that Mr. Howard R. Hughes had no official position as an officer or director with the Tool Company after the close of 1960. He was only its sole stockholder. The Tool Company has advised us by letter dated April 16, 1962, that there is such a community of interest between that company and Howard Hughes, that it produced all relevant files maintained by Mr. Hughes. It is also apparent from a number of the documents produced for examination by the Special Master that Mr. Hughes was active on behalf of the Tool Company, both before January 1, 1961 and thereafter.

The affidavit of Mr. Cook and other portions of the record show quite clearly that in many of the activities by Mr. Cook on behalf of the Tool Company he was acting as a business agent and not merely as a legal advisor. It also establishes [9900] that in his activities as a business agent he obtained information from a number of third parties and presumably communicated it to the Tool Company.

He also appears to have passed on to third parties information, positions, attitudes and claims of the Tool Company concerning numerous specific matters. Wherever Mr. Cook's actions or those of Mr. Davis or Mr. Bautzer would fit into the categories just described, and they were acting as business agents and not merely as lawyers or were expected to communciate information to third parties or receive information from third persons to be communcated

to the Tool Company, all of such communcations and information and the full scope of it would not be privileged because it does not come within the basic requirements to qualify for the privilege.

An additional question is raised as to whether the motions of the parties in this proceeding under Rule 34 which have been sustained include documents in the hands of the parties outside counsel. The records, memoranda, writings and similar documents are described in the motions as those "in the [9901] possession, custody or control of Hughes Tool Company, (Toolco hereinafter referred to as Hughes Tool Company, and any concern or persons associated at any time with Hughes Tool Company, including its sole stockholder)." It would appear that such documents and writings in the hands of outside counsel of the Tool Company while not in the Tool Company's possession or custody would be within its control.

Several New York cases dealing with discovery under New York statutes and not under the Federal Rules of Civil Procedure so hold. They are LeFever vs. Lefkowitz, 178 N. Y. Supp. 2nd 172; In re Buono's Will, 179 N. Y. Supp. 2nd 717 and Duncan vs. Hammond, 190 N. Y. Supp. 2nd 1018. These cases hold that the attorney is but the agent of the client and it is sufficient that one person have in his possession, or in the possession of his agent or attorney or otherwise under his control a paper which relates to the merits of the action. They also recognize that the attorney may have papers which are his own and distinct from those of the client and connected with the preparation of the case. Such papers although not work papers belong to the attorney [9902] as his own and not as the agent or representative of the client and therefore not subject to the control of the client.

An example of this was a request for the typewriter that was used in preparing a will and all of the copies of writings prepared on that typewriter after the date the will was prepared—the Court held that the typewriter and such other writings were not under the control of the client

and the client had no right to them and they were not producible since they were a part of the equipment and materials used by the attorney in the conduct of his office as an attorney.

[9903] It may be that in this case there are writings and documents prepared by outside counsel concerning matters that they were working on for the Tool Company that were either legal memoranda or factual memoranda that the Tool Company would have no right to demand as being within its control, or belonging to it, and in fact there may even be memoranda that the Tool Company did not expect to be made of various conversations or communications. Such writings would be outside the scope of the motions in this action.

Conclusions

Apart from the consideration of waivers the following conclusions are indicated:

1. Any party asserting the attorney-client privilege has the burden of proving the existence of that privilege as to particular documents, writings or testimony.

2. All parties under their Rule 34 motions are entitled to the production of any documents that deal with facts learned [9904] by counsel for the opposing party, from third parties, or sources other than the client, such as reports of conversations and negotiations with anyone not an officer, agent or employee of the client.

3. All parties are entitled under such motions to the production of any documents which were prepared by counsel when such counsel to the clients' knowledge was acting as its business agent in negotiating transactions or contracts.

4. The parties are entitled under their motions to the production of any documents which show on their face that there was no privilege by reason of the fact that the discussions in question were held or the legal advice given in the presence of third parties and to all documents dealing with matters as to which the client had knowledge that there was a waiver of the privilege by reason of communication of matters related thereto to third parties.

[9905] Concerning waivers, a party waives the privilege when it fails to assert its existence, or where it produces a portion of the subject matter by the testimony of counsel in affidavit or other form. Once having put a part of the subject in issue the privilege is waived so that the entire matter may be fully developed.

Where a party puts in issue by its pleadings, the advice of counsel and its right to rely on such advice, the privilege is waived as to all advice on the matter so placed in issue, including the basis for such advice, both legal and factual.

Order

It is therefore adjudged and ordered that all parties to this litigation shall produce in response to the Rule 34 motions filed against them herein, all documents in their possession, custody or under their control, and in their hands or the hands of their agents or attorneys which come within each and all of the categories and classifications described under conclusions in the [9906] foregoing memorandum opinion.

Should any party have questions as to whether particular documents or writings come within the terms of this order for production, the Special Master will examine and rule upon such cases upon their being presented to him.

Dated April 17, 1962, signed by J. Lee Rankin, Special Master.

[1323]

J. LEE RANKIN
36 WEST 44TH STREET
New York 36, New York

MURRAY HILL 7-2924

May 2nd, 1962

Chester C. Davis, Esq.
120 Broadway
New York 5, New York

Re: *TWA* vs. *Hughes Tool Company, et al.*

Dear Mr. Davis:

I have today received from Cahill, Gordon, Reindel and Ohl on behalf of TWA, a request in a letter dated May 1st, 1962 that Toolco be required to produce forthwith all documents written since 1960 which have heretofore been withheld on the grounds of privilege. In the same letter it is also requested that I order Toolco to promptly furnish to me and TWA a list of any documents still being so withheld which were written prior to 1960 and to produce for inspection all documents under my Ruling of April 17th, 1962, and to submit to me for specific rulings any documents as to which the claim of privilege is still being asserted.

The requests set forth in said letter of May 1st, 1962 appear to be reasonable, and I therefore order and direct that Toolco promptly produce for TWA and the other parties to the litigation under their Rule 34 motions, documents as follows:

1. All documents written since 1960 which have been withheld heretofore on grounds of a claim of

privilege by reason of an attorney-client relationship.

[1324] 2. All relevant documents written prior to 1960 heretofore claimed to have been withheld on the grounds of an attorney-client relationship except such documents as Toolco may question as to whether they are producible under my opinion of April 17, 1962, and the letter in regard to said opinion dated April 30th, 1962 addressed to Mr. Davis.

Toolco is also ordered and directed to promptly furnish to me and all other parties to the litigation, a list of any documents which it continues to withhold on the ground of a claim of privilege by reason of an attorney-client relationship and to submit promptly to me for specific rulings any documents as to which the claim of privilege is now being asserted.

Very truly yours,

/s/ J. Lee Rankin
J. Lee Rankin

JLR:hst
CC to All Counsel of Record

[1325]

J. LEE RANKIN
36 WEST 44TH STREET
New York 36, New York

MURRAY HILL 7-2924

May 3rd, 1962

Mrs. Lola Lea
120 Broadway
New York 5, New York

Re: *TWA* v. *Howard R. Hughes, et al.*

Dear Mrs. Lea:

On this date you called and said that counsel for Toolco planned to appeal promptly from my opinion and order of April 17th, 1962 concerning the production of documents claimed to be privileged because of the attorney and client relationship as interpreted by my letter to Mr. Davis on April 30th, 1962 and the letter of May 2nd, 1962 directing Toolco's production under said opinion and order.

I advised you that although the time to appeal may have passed and I would not make a new order fixing a time for Toolco to appeal, and you did not request that, I would re-examine the direction to produce in the letter of May 2nd and consider whether it should be changed so as to cover less than all of the documents which were written since 1960.

Upon such reconsideration, I have determined that the production in the letter of May 2nd should be modified to read:

1. All documents written since 1960 which have been withheld heretofore on grounds of a claim of

privilege [1326] by reason of an attorney and client relationship, where such documents concern or relate to any of the activities of Toolco alleged in the complaint in the above entitled action, with respect to the period subsequent to 1960.

Such production also should include such information received by counsel, and advice given by Toolco's attorneys prior to 1961 as was used or relied upon by counsel in giving advice as to any of the activities of Toolco alleged in the complaint with respect to the period subsequent to 1960.

The letter of May 2nd, 1962 as thus modified is in full force and effect except that as you have requested, I shall not consider that Toolco is in default in complying with such order if it promptly perfects an appeal, and until such time as Judge Metzner shall determine either that the time for appeal has expired or that the order should be sustained, reversed or modified.

Very truly yours,

/s/ J. Lee Rankin
J. Lee Rankin

JLR:hst
CC To All Counsel

Pretrial Order, July 24, 1962

[1331] [61 Civ. 2324]

Defendant Hughes Tool Company has applied to the court to review the opinion of the Special Master rendered on April 17th, 1962 and the order of the Special Master contained in his letter of May 2d, 1962, as modified by his letter of May 3d, 1962, to the extent that the defendant is required to produce for inspection and copying by adverse parties any privileged communications between attorney and client.

The court has reviewed the opinion of the Special Master which appears in the transcript at pp. 4361-4391 and the letters referred to above. The Special Master has made an exhaustive study of the law applicable to the attorney-client privilege. The Court agrees that the law is as stated by the Special Master both as to the privilege and the waiver thereof. The court sustains the ruling of the Special Master as he has applied the law to questions presented to him. If there are any specific documents concerning which the defendant desires specific rulings as to their admissibility, they may be submitted to the Special Master pursuant to the directions appearing at p. 4391 of the transcript and in the letter of May 2d, 1962, as modified by the letter of May 3d, 1962.

So ordered.

Dated: New York, N. Y.
July 24, 1962

/s/ Charles M. Metzner
U. S. D. J.

Pretrial Order, January 19, 1963

[2517]

[CAPTION] 61 Civ. 2324

[Appearances]

[2518]

* * *

METZNER, D. J.:

Defendant Hughes Tool Company (referred to as Toolco) has moved for an order pursuant to rule 30(b) of the Federal Rules of Civil Procedure that the deposition of Howard R. Hughes be taken on written interrogatories or, in the alternative, that if such relief pursuant to rule 30(b) is denied that the motions of Toolco to dismiss the complaint or for summary judgment pursuant to rules 12(b) and 56(b) be brought on for [2519] hearing and determination. The motion further requests that the order of this court dated January 10th, 1963 be stayed until the determination of the motions to dismiss or for summary judgment.

This case was assigned to me for all purposes by the Chief Judge on August 31, 1961 pursuant to rule 2 of the General Rules of this court. After the disposition of several preliminary matters concerning production of documents and scheduling, Toolco commenced taking depositions of the plaintiff in February 1962. The parties requested that a Special Master be appointed to supervise the deposition proceedings and the court designated J. Lee Rankin for this purpose. Since that time over 80 sessions have been held and over 10,000 pages of testimony have been taken.

Sometime prior to July 12th, 1962 the Special Master indicated his serious concern about whether or not Howard R. Hughes would be available as a witness in this proceed-

ing if and when his deposition was reached. Without detailing the subsequent events, all of which are set forth in the order of this court dated September 21, 1962, the problem seemed to have been [2520] resolved when counsel for Toolco filed with the court a document purportedly signed by Howard R. Hughes authorizing said counsel to accept service of a witness subpoena on behalf of Howard R. Hughes. Plaintiff attacked the authenticity of this authorization. Counsel for Toolco flew to Los Angeles and accepted service of a witness subpoena from a Deputy United States Marshal for the Southern District of California at 7 a.m. (10 a.m. New York time) on September 6th, 1962, the morning of the hearing before this court on plaintiff's claim of forgery. The disposition of that matter has been held in abeyance. The subpoena provided for the appearance of Howard R. Hughes at the United States District Courthouse in Los Angeles on September 24th, 1962.

Subsequently, plaintiff moved before the Special Master to suspend the taking of depositions by Toolco in order to permit plaintiff to commence taking the deposition of Hughes pursuant to the subpoena. The Special Master denied this application and this court affirmed that ruling by its decision and order of September 21st to the extent that the deposition was adjourned to October 29th, 1962. [2521] Leave was given Toolco to make application to the Special Master for a further adjournment if in its opinion this was necessary. Such application was made on October 22nd, 1962 and the Special Master adjourned the return date of the subpoena to February 11th, 1963. The court has affirmed that ruling. During the months of September, October, November and December, Toolco has proceeded with its deposition of the plaintiff.

On December 28th, 1962 defendant Toolco made application to the Special Master to take the deposition of two additional witnesses which if granted would have necessitated a further adjournment of the Hughes deposition. The Spe-

cial Master denied this application and the ruling of the Special Master was affirmed by the court in its decision and order of January 10th, 1963.

Counsel for Toolco has repeatedly indicated since the assignment of this case to me that motions theretofore made to dismiss the complaint and for summary judgment would be noticed for argument, but [2522] agreed that they were premature.[1]

The present motion appears to be another attempt to put off the deposition of Hughes. As I stated in my order of January 10th,

> "The complicated nature of this action necessitates long and involved deposition-discovery proceedings and it is only fair that plaintiff be allowed to proceed without waiting for the defendant to complete its deposition proceedings. This is especially true where the plaintiff claims that 75% of the proof necessary to sustain its claim is obtainable from Hughes personally.
>
> "Furthermore, the completion of such deposition will advance materially the date when the court could meaningfully entertain the various motions which Mr. Davis has indicated he would like to press, for a dismissal of the complaint and for summary judgment. It will also facilitate an intelligent ruling upon Toolco's application pursuant to rule 16 of the Federal Rules of Civil Procedure and the sufficiency of TWA's compliance with interrogatories served on October 11th, 1962 and the further interrogatories served on November 13th, 1962."

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[1] Transcript of pretrial conference September 6, 1961, pp. 25-28, 40-41.
Transcript of pretrial conference October 2, 1961, pp. 10, 23.
Transcript of pretrial conference February 23, 1962, pp. 58-59.
Transcript of pretrial conference September 19, 1962, p. 39.
Transcript of pretrial conference January 9, 1963, p. 17.

[2523] Because of the issues involved in this litigation and the nature of the proof sought from Hughes, the use of written interrogatories would be a wholly unsatisfactory procedure. Contemplated answers to specific interrogatories may not be forthcoming, which would render meaningless subsequent questions. Answers given might suggest further questions to sufficiently probe for the facts, but such questions would not appear in the interrogatories. None of the grounds asserted or implied are sufficient in this case to justify proceeding initially by written interrogatories. Consequently, the first branch of the motion, seeking relief pursuant to rule 30(b), is denied.

As I have indicated above in the quotation from the January 10th order, it would appear to the court that the case is not in a posture for a meaningful disposition of the motions to dismiss the complaint or for summary judgment. The motion papers filed before the assignment of the case pursuant to rule 2, which I assume are the motions Toolco is now bringing on for hearing, were predicated upon the grounds that the complaint fails to state a claim upon which relief can be granted, that this court lacks jurisdiction of the [2524] subject matter of the action, and that there is no genuine issue as to any material fact. More specifically, it is stated that the transactions complained of were subject to and approved by orders of the CAB under section 408 of the Federal Aviation Act of 1958 and therefore pursuant to section 414 of that act there is an exemption from the operations of the antitrust laws, that if there is any question as to the scope or the enforcement of the above orders, they are matters within the exclusive jurisdiction of the CAB, and finally that the activities of Toolco subsequent to 1960 which are alleged to have constituted a malicious and willful interference with TWA's business were taken on advice of counsel.

The court, of course, cannot prevent defendant Toolco from pressing these motions at this time. However, since

counsel for the defendant has been contemplating the motions for more than a year and a half, he obviously does not need the six weeks which he requests for the preparation of his papers. Counsel for plaintiff has indicated that he will cooperate in relieving defendant of a schedule with regard to motions [2525] pending in a companion action in Delaware, so as to free counsel for the defendant to devote his efforts entirely to these motions. As I indicated to counsel in an informal conference on January 16th, I will fix the date of February 1st, 1963 at noon for defendant to file all additional papers in support of its motions, and plaintiff shall be given until noon of February 8th, 1963 for answer. If upon reading defendant's papers the court is of the opinion that there is doubt as to its preliminary observations that these motions are premature, it will advise counsel of a short adjournment of the deposition of Hughes. In the meantime, this deposition shall go forward as ordered, on February 11th, 1963.

The order of January 10th will not be stayed pending a determination of the motions to dismiss and for summary judgment. The documents which the court has directed be turned over to the plaintiff shall be furnished as provided in the order of January 10th, 1963 except that the date of January 14th, 1963 as fixed in paragraph 4 of that order is amended to read "January 22nd, 1963".

[2526] At the hearing before the Special Master on January 17th, counsel for defendant was reluctant to indicate whether he desired to hold the deposition at some place other than the United States Courthouse in Los Angeles. As counsel for the plaintiff and the additional defendants have indicated, they are amenable to cooperate in any reasonable request of counsel for the defendant, but it is necessary that advice of a change be given so that necessary arrangements can be made. Consequently, unless counsel for the defendant indicates by noon on January 22nd, 1963

a desire to change the designated place, the deposition shall proceed in the United States Courthouse in Los Angeles.

So Ordered.

Dated: New York, New York
January 19, 1963

/s/ Charles M. Metzner
U. S. D. J.

Deposition Proceedings, September 17-18, 1962

[13149]

* * *

Mr. Davis: Mr. Special Master, it is now approximately 4:30, and would be a convenient time for me to stop today with this witness.

But before closing the record on today's session, I would like to make a statement on the record in connection with the ruling of the Special Master of Saturday relating to privileged documents.

I would like to make that statement without in any manner seeking to reargue any portion of it, or invite any argument.

Mr. Williams: May the witness be excused?

The Special Master: Yes.

(Whereupon, the witness was excused.)

Mr. Davis: Without in any way inviting reargument on the part of anyone else.

What I would like to say is this: First of all, unless circumstances change by reason of the offer I am about to make, the Tool Company intends to seek a review of the Special Master's ruling in the area of these privileged documents.

[13150] The ruling as we understand it requires the Tool Company to furnish a list of the documents involved not later than Wednesday of this week, and to seek a review not later than Friday of this week.

It seems to us that if we are going to be required to make those documents available, that it is unnessary effort for us to attempt to prepare a list identifying those documents, so unless that time period is changed, we will find it necessary to file a notice seeking a review not later than Wednesday as a practical matter.

I realize that we have not in the past here attempted to refer to General Rule 9(F) in seeking to compromise any difference of opinion which might

exist with respect to rules under the discovery rules, but whether or not that is so, this is what we would like to suggest to all parties as a possible solution to this problem which might avoid the necessity of burdening the Court with a review of the questions which were argued and decided last Saturday.

First of all I must point out this offer contemplates an acceptance by all parties. In other words, unless it is accepted by all parties, it cannot become effective.

[13151] The Special Master: It doesn't contemplate any action by the Special Master, does it, because I question my jurisdiction.

Mr. Davis: No, I just wanted on the record to make this offer, and then be advised as to whether or not it is accepted or rejected. I merely want to point out that unless this deadline of Wednesday is changed by the Special Master, we would want to be advised as to whether or not our offer is acceptable by all parties not later than noon tomorrow, Tuesday.

If this offer is accepted in its entirety by all parties, the Tool Company will be prepared to proceed as follows:

First, we would prepare and furnish to all parties promptly a list identifying the documents which are involved.

Secondly, we would deliver at this time to the Special Master all of the documents which are involved for retention by the Special Master.

Thirdly, when it appears that TWA, the plaintiff, has disclosed to the satisfaction of the Special Master or the Court the facts upon which it relies in support of the allegations of the [13152] complaint, and it is determined by the Special Master or the Court that the factual contentions of the plaintiff are sufficient to sustain the jurisdiction of the Court over the sub-

ject matter of this action, then at that time the Tool Company would be prepared to waive its attorney-client privilege to the extent necessary so as to permit the Special Master at that time to make available to all the parties whatever documents the Special Master finds relate in any way or bear upon the factual contentions of the plaintiff as a result of whatever procedure we pursue based upon whatever Judge Metzner may decide to do upon an application which we intend to make following the suggestion of the Special Master under Rule 16.

We would be prepared to follow a similar procedure with respect to whatever rights the additional defendants may have to any of such otherwise privileged documents which might bear in any way upon any factual issues or contentions which may develop as a result of whatever similar comparable pretrial procedures are pursued for a development of the factual issues in existence between the parties.

[13153] In other words, what I am saying in substance is this. The Tool Company is resisting a disclosure of those documents at this time which would unquestionably have the effect of waiving for all time the attorney-client privilege with respect to those documents, even though subsequently it may be determined that the Court has no jurisdiction over the subject matter of this action.

And will prior to the time that the defendant is in a position to determine in an intelligent manner what the factual basis is for the contentions of the plaintiff.

At the same time we have no desire through the assertion of the attorney-client privilege to withhold from any of the parties any document which contains any material which might conceivably have a bearing upon whatever factual issues remain or

are established as a result of these pretrial procedures which are now being contemplated.

As I say, unless the Special Master extends the time beyond Wednesday within which we must seek a review, we would like to be advised not later than noon tomorrow by all parties as to whether or not this offer of the Tool Company is [13154] acceptable to them in lieu of the ruling of the Special Master, in which event we would have no reason for seeking a further judicial determination of the respective contentions of the parties.

Mr. Barr: May I make an inquiry?

The Special Master: Yes.

Mr. Barr: I can do this on the record or off the record.

Mr. Davis: I don't know what your inquiry is.

Mr. Barr: Let me do it off the record.

(Discussion off the record.)

Mr. Davis: Let us go back on the record.

In my statement of the offer which the Tool Company is making, I intended to include any factual issues raised by the defense of the answer.

Mr. Barr: And likewise to apply to the counterclaims.

Mr. Davis: And likewise it applies to the counterclaims. I don't think anybody is being misled by that. Obviously the defenses of the answer will be tailored to whatever is established by the complaint.

For example, if it develops as a result of this pretrial conference on the issue of willful, malicious interference with the affairs of the Tool Company, [13155] that that contention is based solely upon the contention made by Mr. Tillinghast in his deposition, and that is the only factual issue involved, then presumably insofar as documents to be made available to the defendants on that phase of it would be

those documents which relate to that conduct, if there are any.

Additionally, once it is established what the factual contention is as to the alleged conduct of the Tool Company in violation of the antitrust laws—advice of counsel was not a defense, but assume it is still part of the answer as part of the defense—then whatever documents there are which are presently privileged relating to the conduct which is being asserted factually to constitute a violation of the antitrust laws, we would waive our privilege, so as to give all the parties all documents which exist, privileged or not, which have any bearing on the facts which are contended by the plaintiff as a violation of the antitrust laws.

The Special Master: I think you should make your inquiry on the record, and an answer on the record so you fully understand each other.

Mr. Barr: As I understand what you are now [13156] saying, if your proposal were accepted, you on behalf of the Tool Company would waive any appeal from the Master's ruling of Saturday, and moreover, any appeal—

Mr. Davis: Relating to privileged documents.

Mr. Barr: Certainly—and moreover, any appeal at a later time as to the Special Master's decision of whether or not the documents were related in any way to the issues.

Mr. Davis: We would not seek any review of the Special Master's determination as to which documents, if any, or if all of them that will have been delivered to him relate to or have a bearing upon the factual issues between the parties.

Mr. Barr: I will let you know in the morning.

(Whereupon, at 4:45 p.m., the deposition was adjourned to September 18, 1962, at 10:00 a.m.)

Deposition Proceedings, September 17-18, 1962

* * *

[13160] ROBERT WILAND RUMMEL, having previously been sworn, resumed the stand and testified further as follows:

Mr. Williams: May we go on the record?

The Special Master: Yes.

Mr. Williams: I understand that last evening you made a suggestion with respect to privileged documents, an offer, and I understand that we are to [13161] let you know by 12 o'clock whether we will adhere to the ruling of the Special Master or whether we will take your suggestion.

Mr. Davis: I indicated before you came in, Mr. Williams, that by noon I meant after the noontime recess, at least, that I would like to know when we resume after lunch, unless, anyone thinking that the matter deserves more careful consideration, you prevail, with my support, upon the Special Master to extend the date within which I may file a notice of appeal.

Mr. Williams: I don't need any more time.

Mr. Davis: In which event I would be happy to grant a period longer than after the luncheon recess.

Mr. Williams: Mr. Davis, I don't need any more time. I am prepared now to say that we reject your offer.

The Special Master: You may proceed.

Mr. Davis: Any other preliminary remarks?

Examination (cont'd) by Mr. Davis:

* * *

Pretrial Argument, January 28, 1963

[24798]

[CAPTION] 61 Civ. 2324

[24799]

Before: Hon. CHARLES M. METZNER, District Judge

New York, January 28, 1963,
5 p.m.

[Appearances]

* * *

[24802] The Court: Secondly, we have your application to review the order of the special master regarding the production of the so-called tax documents.

Mr. Davis: That is correct, your Honor.

The Court: Let us hear argument on that.

Mr. Davis: All right, your Honor.

I am not prepared to present to the Court at this time all the facts and circumstances relating to the problems of the Tool Company in connection with the production of those documents. I have been in communication with Mr. Holliday in Houston, who in turn reported to me the information he obtained there. I am prepared to give that information to your Honor orally now.

I would hope to have an opportunity to submit an appropriate affidavit identifying what those circumstances are and perhaps more fully or accurately than I can state them now.

I am sure your Honor will appreciate that I have been addressing myself primarily to the problem [24803] of the papers that I am to file by February 1 on the very important motion to dismiss that we have brought on, which is now pending before your Honor.

Quite apart from any other consideration, I am informed that in order to review the files which would have to be reviewed to reduce the documents which are called for by the schedule annexed to Mr. Hupper's affidavit it would require a review of substantially all of the same files which were reviewed once before in connection with the production of documents which was made pursuant to your Honor's order of, I believe it was, March of last year. In other words, there is no way that all the documents called for by that schedule could be produced other than by reviewing substantially all of the files, both in Houston and in Los Angeles, which were reviewed once before.

I am informed that it is the opinion of those who are familiar with those files that probably all the documents called for have already been produced and made available to plaintiff and these additional defendants. To be sure, that does not include the 1961 tax return or the 1962 tax return called for, which is not yet prepared, and [24804] of course that is not available.

I am also informed that based upon the actual cost and expenses incurred in connection with the prior review of the files and production, it is estimated that the cost of doing this at this time would be conservatively at least $150,000.

I am also told that in order to review the files which would have to be reviewed it would take a period from four to six weeks.

I am also informed that at this time, particularly with the year end and the work which has to be done in connection with year-end tax returns, federal and state, the closing of the books, the individuals who are familiar with or who could most readily identify the documents called for, which relate to information that was used in connection with the review by the Internal Revenue of whatever tax returns were filed or whatever questions were raised, are all at this time busily engaged on other matters.

Now, this is the substance of what I was told. I have asked that it be put in affidavit form so I could submit it to your Honor. I expect to have it shortly. I am not in a position to per- [24805] sonally supervise the preparation of the affidavit.

However, in that connection, your Honor, I think that I should also state that the Tool Company believes quite sincerely that the motion to dismiss is entitled to not only the most careful consideration by the Court but, notwithstanding the indications given on the record by the Court, is firmly convinced that the action will be dismissed and therefore has asked me to resist as respectfully as I can granting to these plaintiffs or additional defendants further discovery causing any further expense or burden upon the Tool Company until after the Court has either decided the motion to dismiss or has satisfied itself that it is a meritorious motion to dismiss.

While I am up I will cover all the ground at once, and, without suggesting that I believe that the Court is likely to require that the Tool Company incur the burden of expense I have attempted to describe prior to a consideration of our motion to dismiss, I would like to respectfully suggest that, if the Court is of a different view, as in the case of the privileged documents, which the Court's order [24806] of January 10th and January 19th required me to produce — and I exhausted my efforts to obtain a review of those orders unsuccessfully — I be given an opportunity of developing some procedure so that I may have some kind of an order which would be appealable, because I know that I still have to convince your Honor that the motion to dismiss that we are bringing on is a meritorious one.

I believe that when I submit my papers on February 1, and they are not going to be in as well organized a shape as I would like them to be — I am running behind schedule — I believe that your Honor will be satisfied, whichever way

your Honor will decide the question, that it is a serious and meritorious question, and I can personally assure your Honor that the desire on the part of the Tool Company to resist further production or discovery preceedings by the plaintiff at this time is not for the purpose of interfering with the expeditious disposition of this lawsuit.

I would like to finish my remarks by pointing out that somehow or other the issue seems to have developed as to whether or not Mr. Hughes will or will not be available on a particular date [24807] and whether or not the Tool Company will or will not make further production of documents, rather than the question which basically the Tool Company has sought to bring on for disposition, and that is whether or not this Court should entertain any further the action commenced by this complaint. And I think at this point perhaps I should address myself, unless it would be preferable that I wait in connection with the application which is being made to withdraw the motion to dismiss the counterclaims —

The Court: I assume that would be in answer to what they have to say, because you still do have at the present time the counterclaims pending; so even if you were successful on a motion to dismiss the complaint, you still have counterclaims totaling $385 million for which Mr. Hughes' deposition is also scheduled.

You can answer that after we hear from the plaintiff and the additional defendants on the question of the production of the so-called tax documents, and then I will come back to you, Mr. Davis, because I am sure you will be answering that question on the counterclaims.

[24808] Mr. Davis: All right, your Honor.

The Court: Who wants to start off — Mr. Sonnett or Judge Bromley?

Mr. Bromley: May it please the Court, I take it from what we have just heard that Mr. Davis does not now dispute the correctness of the special master's finding that

good cause has been shown for the production of the documents requested under the Rule 34 motion; that said documents are all relevant; that it does not present a new or novel contention because the plaintiff many months ago was put on notice that we wanted these documents; that we were making the contention that the Tool Company made a profit and received tax advantages from its transactions.

I take it that he no longer disputes that the documents are important and necessary and that his sole argument is related to the burden and that he wants more time.

Well, the master recognized that there was a burden, but found that it was not an unreasonable one and that he should comply, because it was highly important that we have the documents prior to the taking of the deposition of Mr. Hughes.

[24809] Now, as your Honor has indicated, I am not at all concerned with his motion directed toward the complaint because I am perfectly clear that the counterclaims will stand, and I assert that I have a right to examine Mr. Hughes and to get these documents all in relation to my examination with respect to the counterclaims.

I therefore take it that it is perfectly clear that the special master's action should be affirmed by you and that we should proceed to give our attention to the question of how serious, if at all, the question of burden really is. And I think you, Mr. Sonnett, should express your views in that respect of that matter to his Honor.

The Court: Mr. Sonnett.

Mr. Sonnett: Yes, your Honor. I have a short answering affidavit in connection with Mr. Davis' appeal on the tax document matter. With the Court's permission I would like to serve it and file a copy now. It has some facts which I think should be in the record before your Honor on this question of burden.

The Court: Go ahead.

Mr. Sonnett: Does your Honor wish to [24810] examine that affidavit or shall I paraphrase it?

The Court: You might as well paraphrase it.

Mr. Sonnett: In paragraph 2, your Honor, the affidavit adverts to the findings by the special master based on his intimate familiarity with the discovery matters in this case.

The burden of production on the Hughes Tool Company of these documents at this time is in fact reasonable.

Secondly, in paragraph 2 of the affidavit we refer to that portion of the special master's ruling in which he adverted to the fact that employees and counsel of Houston, Texas, who have for many years represented Tool Company generally as well as in its tax matters, could assist in the production to such an extent that the burden upon Mr. Chester C. Davis and his associates in connection therewith should not be great.

In paragraph 3, your Honor, the affidavit develops the fact—and we believe it to be the fact—that a substantial amount of work has been done previously in assembling various material which will be of help in connection with this matter, [24811] such as supporting papers, work papers relating to financial statements, and other detailed financial information.

That became known to us first about a year ago when they were producing documents at Houston, Texas, and at that time they withheld two or three boxes of work papers which were said to contain supporting work papers relating to financial statements and the like. That matter was brought to the attention of the special master on March 22, 1962, and it resulted in a direction by consent in effect that that material be held in the custody of Mr. Cook's firm for delivery as might be required later.

In paragraph 4 of the affidavit we point out that the Andrews, Kurth, Campbell & Jones firm, which is undeni-

ably one of the leading firms in Texas, has been counsel for the Hughes Tool Company for some 50 years; that Mr. Cook has been personally engaged in the legal and financial matters of Hughes Tool Company for over 10 years, this by their own statements.

Accordingly it seems to us that with the resources available in the Andrews, Kurth firm, the [24812] production can, if there is a will to do it, be made promptly and, indeed, it can be made by Wednesday, recognizing, however, that the matter of production of documents is always a burden on every litigant, as it has been, I can assure the Court, in the case of TWA, where we have produced hundreds upon hundreds of thousands of documents at great expense to our minority stockholders—recognizing that burden, however, our proposal in this affidavit is that your Honor direct that whatever is available now be produced by June 30, 1963, as the master has directed; that your Honor further direct that there be a production on a day-to-day basis thereafter until the production is complete, and that it should be complete on February 6, 1963, which gives them about a week's extension of time to make the production, which the master has found, in fact, could reasonably have been made on the 30th of January.

Now, as to the importance of the TWA viewpoint in having the documents, I think it speaks for itself, your Honor. We want them not only for the deposition of Mr. Hughes, but it is my opinion and belief that these documents, when we get them, may [24813] be of considerable materiality for the motion which Mr. Davis is now at long last bringing on and insisting be pressed to your Honor prior to the Hughes deposition.

I think that materiality is evidence, your Honor, from the fact that I hold in my hand documentary proof from the Bank of America files of statements made by Mr. Hughes himself in 1960 and statements made by Mr. Noah

Dietrich in 1960 specifically pointing out that the 102 tax problems had always been and were at the heart of the Hughes problem, and I propose to establish on the record to date, and certainly so out of Hughes' mouth when he is deposed, that because of the tax problems of Hughes Tool Company and Mr. Hughes personally they engaged in the course of conduct alleged in our complaint and that that course of conduct undeniably violates the antitrust laws and was not and could not be exempted or dealt with by the CAB.

So I would like to have these papers in connection with his motion as well as in connection with the deposition.

Thank you, your Honor.

The Court: Mr. Chandler?

[24814] Mr. Chandler: I have nothing to add to the statements of Mr. Sonnett, your Honor.

The Court: Mr. Stewart?

Mr. Stewart: I join very heartily in the statements that Judge Bromley and Mr. Sonnett made.

The Court: All right.

Mr. Davis: May I reply?

The Court: Surely.

Mr. Davis: If your Honor please, I don't know about the facts referred to in Mr. Sonnett's affidavit. I do have a recollection about some arrangements that some work papers were to be kept by Mr. Cook pending some determination of confidentiality. As far as I know, they were all produced, but I don't know what the facts are in that regard.

What I would like to address myself to primarily, however, is to the assumptions made by Judge Bromley in his remarks that I am conceding that there was good cause or relevancy in the documents called for. That, of course, is not an accurate statement of my position. My position is at this point I am not prepared to address myself to [24815]

that request or to that review of the special master's order. I simply have not had time to prepare in view of my efforts to work on the brief.

May I point out, first of all, how the additional defendants are affected by whether or not the Tool Company made a profit or did not make a profit or obtained some tax advantages reviewed by the Bureau of Internal Revenue with respect to its control or exercise of control of TWA, I just don't see how that establishes any relationship whatever to their defense.

In so far as plaintiff TWA is concerned, Mr. Sonnett just said that this will indicate to give an explanation as to why Mr. Hughes engaged in the course of conduct allegedly in violation of the antitrust laws.

I respectfully submit, your Honor, we are not concerned as to why someone violated the antitrust laws; we are concerned with whether they were violated, and I respectfully submit that whether or not the Tool Company did or did not make a profit in transactions which were reviewed and approved by the CAB and whether or not the purpose or objective or reasons why the Tool Company acquired 78 per cent [24816] control of TWA was because it would put it in a position where it could employ its cash and thereby avoid whatever is to be avoided against an improper accumulation of cash, and whether or not that was done by buying more securities of TWA or by providing funds for the acquisition of aircraft by TWA, I just don't understand how that can be said to be seriously documents that they have to have for the purpose of establishing either that the Tool Company or Mr. Hughes engaged in a violation of the antitrust laws or how they could conceivably afford a defense to any of the counterclaims.

It is respectfully submitted at this point, however, that I am expressing this at what seems to me to be a rational reaction to the statements that I have heard, and I respect-

fully request the Court for an opportunity to address more fully on that question.

The Court: You have had this problem for a long, long time. I don't think you need any more time to present your point of view on this.

There is nothing new; it has been hanging around for several weeks.

Mr. Davis: What has been hanging around [24817] for several weeks, your Honor?

The Court: This production of the documents. What was the date of your affidavit before the special master?

Mr. Davis: The special master's ruling —

The Court: You prepared yourself to oppose the ruling of the master, you must have prepared yourself for this too. What is the date of the Hupper affidavit?

Mr. Bromley: January 9th.

The Court: Today is January 28th.

Mr. Davis: That is correct, your Honor, and I can assure you that between January 9th and now I have been on one matter or the other constantly in connection with this litigation.

I would also like to point out that I have lost two, almost three days of the time that was allotted to me by the Court in connection with the preparation of this material relating to this motion to dismiss. One of them was I received a request to attend a subcommittee of the Senate Judiciary Committee, it is called some Antimonopoly Committee, with Senator Kefauver with reference to the Pan American-[24818] TWA merger and whether or not there was any pressure being applied on Mr. Hughes or the Tool Company in connection with this Pan American-TWA merger. I have received two calls today, from the Justice Department on the same question, and between times your Honor knows I have had to prepare papers and appear before the Court of Appeals—

The Court: This is your choice, not mine.

Mr. Davis: I understand that, but nevertheless I don't believe the circumstances here present indicate that the Hughes Tool Company is not entitled to whatever efforts it is entitled to make in order to protect what it believes to be its rights. I don't think there can be any question that if, in fact, as we claim we are going to be able to satisfy your Honor shortly, this complaint lacks merit and is a matter which is not properly before this Court but should be properly before the CAB, I respectfully submit that there is a grave injustice being done by requiring the Tool Company to do any more than it already has done.

The Court: You already have boxes of this stuff that you have gone through. Turn it over.

[24819] Mr. Davis: That is what happens when we get the facts piecemeal. That is not compliance with the schedule that Mr. Hupper has stated. That was compliance with your Honor's order as construed by the special master with respect to what we in fact did produce on March 15th and April 15th of last year.

The Court: You have it, haven't you, and it has been gone through?

Mr. Davis: They have been made available, your Honor.

The Court: These three boxes, I understand, have not been made available.

Mr. Davis: Your Honor, all I know is that Mr. Cook assumed the responsibility with respect to that production. The special master required that something be done, and it was done. There was a ruling with respect to treating it with confidentiality.

If what we are talking about is this affidavit by Mr. Hupper, I frankly do not know what is in this affidavit, and I am not in a position to either analyze what is in those boxes, if there are any such boxes—

[24820] The Court: Mr. Cook is, though, isn't he?

Mr. Davis: Mr. Cook has been engaged as I have been—

The Court: Let us get one thing straight. Has the material in the three boxes been turned over to parties in this litigation?

Mr. Davis: Have they been?

The Court: Yes.

Mr. Davis: I haven't the slightest idea.

The Court: Why don't you ask Mr. Cook tonight. If they haven't, turn them over.

Mr. Davis: I will do that.

Mr. Bromley: Of course not. They have been refused.

The Court: He has had them for a long time.

Mr. Davis: Your Honor, I cannot say any more sincerely than I have already said that it seems to me—and I believe I have authority to support it, if I had time to present it to your Honor—that there is a serious motion to dismiss this complaint.

[24821] The Court: You have argued that before the Court of Appeals.

Mr. Davis: No, your Honor. The only thing I have argued before the Court of Appeals was whether or not the order of this Court with respect to privileged documents was appealable and therefore reviewable.

The Court: I read what you said before the Court of Appeals. You went beyond that narrow point, Mr. Davis.

Mr. Davis: Now, your Honor, if your Honor has the record of the argument before the Court of Appeals and the notice of appeal that was filed, you are fully informed as to what took place there. All I can say, your Honor, is that it was one order which covered the production of the privileged documents and referred to other material. In order to obtain a stay from the Court of Appeals it was necessary for me to have an appealable order and my under-

standing of what the Court of Appeals did was to refuse to recognize that the order requiring the production of documents was appealable and thereby denied me a stay and did not consider my [24822] writ of prohibition—

The Court: Did not.

Mr. Davis: Did not.

The Court: I think Judge Lumbard directed you to argue all three items before him. It says so in the record.

Mr. Davis: If your Honor please, it turned out to be that I was denied leave to file it. That is what the order of the court was.

Mr. Sonnett: It was on our cross motion which was before the court.

Mr. Davis: I came back from Washington, your Honor, on Tuesday, late Tuesday afternoon, having spent the day with this Kefauver committee, which, like everybody else, takes the position, an independent branch of the government—I tried to tell them I was busy in a court proceeding—that it is none of their concern, and found myself in the Court of Appeals the next day; and I respectfully submit to your Honor that I did not argue my writ of prohibition and that all that has happened so far has been that the order of this Court with respect to privileged documents was held to be nonreviewable, and I am perpared to follow whatever [24823] procedure is the appropriate procedure to follow in order to obtain what may be a reviewable order.

The Court: Well, I come back. It appears that Mr. Cook has two or three file boxes of work papers supporting the financial statements sent to the special master which had been held pending determination of their confidentiality, which means they have been reviewed and you know what is in them, and they have been there since March of 1962.

Mr. Davis: I will be perfectly happy, your Honor, to get what the facts are and submit them to your Honor. I

am just not in a position to give you the information that you are asking me for.

The Court: Call me tomorrow morning and let me know.

Mr. Davis: I did not hear what your Honor said.

The Court: Call me tomorrow morning after you have spoken to Mr. Cook. At your suggestion Mr. Cook has them, according to this transcript before the special master, if Mr. Sonnett has correctly reproduced the transcript.

Mr. Davis: I will undertake to give the facts to your Honor tomorrow morning.

[24824] The Court: But I can't see any reason for any more time to argue why these things should not be submitted. You have had that same problem with even a greater degree in the attorney-client privilege asserted by you.

Secondly, I haven't heard anything about the question of, assuming that the complaint is dismissed, which is what your goal is now, the six counterclaims that are still pending in this court asserted by you against the plaintiff and the additional defendants.

In regard to the plaintiff, the plaintiff has moved to withdraw its motion to dismiss the counterclaims, and the additional defendants have filed their answers to those counterclaims, and Mr. Hughes is being deposed on those as well as upon the complaint, so I can't see why this material can't be furnished.

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Pretrial Order, February 1, 1963

[2926]

[CAPTION] PRETRIAL ORDER 61 Civ. 2324

A pretrial conference was held in the above action on January 28th, 1963 at 5 p.m.

Four matters were presented to the court for consideration:

1. A motion by the defendant Hughes Tool Company, returnable February 8th, 1963 at 4 o'clock, to adjourn the deposition of Howard R. Hughes presently scheduled for February 11th, 1963 until after a final adjudication of said defendants' motion to dismiss the complaint. This motion was advanced for argument to January 28th, and on the record of the pretrial conference, the attorney for Hughes [2927] Tool Company withdrew the motion.

2. A motion by the plaintiff Trans World Airlines to withdraw its motion to dismiss the counterclaims, except that portion of said motion which attacks the second counterclaim for failure to state a claim and the motion for summary judgment with respect to the sixth counterclaim. This motion is granted and plaintiff is directed to file its reply to the counterclaims of defendant Hughes Tool Company within ten days after the conclusion of the deposition of Howard R. Hughes.

3. A motion by the additional defendant Charles C. Tillinghast, Jr. for leave to answer the counterclaims of the defendant Hughes Tool Company ten days after the conclusion of the deposition of Howard R. Hughes. This motion is granted.

4. A motion by the defendant Hughes Tool Company to review an order of the Special Master dated January

22nd, 1963 requiring the defendant Hughes Tool Company to produce for inspection and copying the so-called tax documents. As to the nine boxes of papers which the court is informed may contain pertinent documents in relation to the request to produce, the defendant Hughes Tool Company is directed to send them today to counsel for the plaintiff, who shall make arrangements for producing copies thereof for the plaintiff and the additional defendants. If the defendant Hughes Tool Company contends for some reason or other that said documents are not subject to production, then the nine [2928] boxes shall be sent today to the Special Master, who shall rule upon any objections that the defendant shall make to the production of specific documents. Any other documents subject to the notice and affidavit of January 9th, 1963 shall be produced on a daily basis on or before February 11th, 1963.

So Ordered.

Dated: New York, N. Y.
February 1st, 1963

Charles M. Metzner /s
U. S. D. J.

A-145

Toolco's CAB Complaint

[3787]

BEFORE THE

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

IN THE MATTER *of* The Complaint of HUGHES TOOL COMPANY, *against* METROPOLITAN LIFE INSURANCE COMPANY, THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, IRVING TRUST COMPANY, DILLON, READ & CO. INC., ERNEST R. BREECH, BEN-FLEMING SESSEL, JAMES F. OATES, JR., HARRY C. HAGERTY, CHARLES C. TILLINGHAST, JR., *and* PAN AMERICAN WORLD AIRWAYS, INC., and JUAN T. TRIPPE, Under Sections 408 and 1002 of the Federal Aviation Act of 1958.	Docket No. [14314]

COMPLAINT OF HUGHES TOOL COMPANY AND REQUEST FOR INVESTIGATION

HUGHES TOOL COMPANY ("Toolco"), pursuant to the provisions of Sections 408 and 1002 of the Federal Aviation Act of 1958, as amended (the "Act"), on behalf of itself and of TRANS WORLD AIRLINES, INC. ("TWA"), hereby complaining of the acts and conduct of METROPOLITAN LIFE INSURANCE COMPANY ("Metropolitan"), THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES ("Equitable"), IRVING TRUST COMPANY ("Irving"), DILLON, READ

& Co. Inc. ("Dillon Read"), Ernest R. Breech ("Breech"), Ben-Fleming Sessel ("Sessel"), James F. Oates, Jr. ("Oates"), Harry C. Hagerty ("Hagerty"), Charles C. Tillinghast, Jr. ("Tillinghast"), Pan American World Airways, Inc. ("Pan Am") and Juan T. Trippe ("Trippe") (hereinafter referred to as the "Respondents"), requests that the Civil Aeronautics Board (the "CAB" or the "Board") institute an investigation for the purpose of:

(1) Determining whether the acts and conduct complained of have resulted or will result in

(a) acquisition or continuation of control of TWA for which Board approval pursuant to Section 408 of the Act is required but has not been obtained;

(b) acquisition or continuation of common control of TWA and Pan Am for which Board approval pursuant to Section 408 of the Act is required but has not been obtained;

(c) interlocking relationships which are in violation of Section 409 of the Act;

[3788] (d) interlocking relationships which should now be found to be against the public interest;

(e) unfair methods of competition in violation of Section 411 of the Act; or

(f) other violations of the Act requiring investigation by the Board;

(2) Determining whether such acquisition or continuation of control, common control, interlocking relationships, unfair methods of competition, or other

violations, if any, are consistent with the public interest and fulfill the conditions of the Act; and

(3) Entering any such order or taking any such further action herein as may be appropriate pursuant to the provisions of the Act.

In support of this complaint Toolco alleges as follows:

PART ONE.

Description of Parties.

1. TWA is a corporation organized and existing under the laws of the State of Delaware, with its principal offices in the City of New York. TWA is and for many years has been the country's third largest domestic and second largest international air carrier.

2. Toolco is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Houston, Texas. At all times hereinafter mentioned, from 1947 to December, 1960, Toolco owned a majority of TWA's capital stock and nominated a majority of TWA's directors. Since December, 1960, Toolco has remained the equitable owner of in excess of 78% of the capital stock of TWA, which stock was placed in a voting trust in December, 1960, at the instance of certain lending institutions, as hereinafter more fully described. Pursuant to the Board's Order No. 3210 in Docket No. 1182, dated October 17, 1944, and to subsequent orders of this Board, Toolco's exercise of control over TWA has been under the continuous supervision and direction of this Board as evidenced by the record of proceedings and orders of the Board in Docket Nos. 1182, 2796, 8061, 8235, 11620 and 13328. Toolco is also the controlling stockholder of Northeast Airlines, Inc. ("Northeast"), such control having been

approved by the Board's Order No. E-18470, dated June 19, 1962.

3. Respondents Metropolitan and Equitable are corporations organized and existing under the laws of the State of New York with their principal places of business in the City of New York. Metropolitan is the country's largest insurance company with admitted assets of approximately $17 billion. Equitable is the country's third largest insurance company with admitted assets of approximately $10 billion. From 1945 to December 1960, Equitable was the sole holder of TWA's senior indebtedness other than bank debt. At all times since December, 1960, Equitable and Metropolitan have been the holders of all such senior indebtedness of TWA. Upon information and belief, respondent Oates and respondent Hagerty are citizens of the State of New York; Oates is, and at all times hereinafter mentioned since 1955 has been, the president of Equitable and is and has been since said date in a position to determine or influence its lending policies; Hagerty at all times hereinafter mentioned since 1955 until December 31, 1961 was the Vice Chairman of the Board of Directors of Metropolitan and was during such period in a position to determine or influence its lending policies.

[3789] 4. Respondent Irving is and for many years has been one of TWA's principal commercial bankers and has made loans and participated with other lending institutions in making loans to TWA. Sessel is a citizen of the State of Connecticut. He is and at all times hereinafter mentioned since 1955 has been the senior vice president of Irving and a director of TWA.

5. Respondent Breech is, upon information and belief, a citizen of the State of Michigan. From December, 1960,

until his resignation on or about January 26, 1962, he was one of the two voting trustees selected by Equitable and Metropolitan with respect to 5,221,301 shares of TWA's capital stock owned by Toolco which were placed in a voting trust in December 1960. Breech is and at all times since April 27, 1961 has been the Chairman of the Board of Directors of TWA. Respondent Tillinghast, a citizen of the State of New York, is and at all times hereinafter mentioned since April 17, 1961, has been the president and chief executive officer of TWA. Respondent Dillon Read, on information and belief, is a corporation organized and existing under the laws of the State of New York with its principal place of business in the City of New York. Dillon Read is engaged in the investment banking business and is and since early 1959 has been the principal financial adviser to TWA.

6. Pan Am is a corporation organized and existing under the laws of the State of New York with its principal place of business in the City of New York. It is the country's largest international air carrier and is in competition with TWA on TWA's principal international routes. Trippe is a citizen of the State of New York. He is and at all times hereinafter mentioned has been president and chief executive officer of Pan Am. The stock of Pan Am is widely held and no stockholder owns as much as 1%. Trippe was one of the organizers of Pan Am and since its organization has dominated and controlled the decisions and acts of the corporation. Upon information and belief, his long exercise of that control and his selection of Pan Am's Board of Directors has made Pan Am and its Board of Directors completely biddable to his personal wishes. Pan Am, in addition to being itself a certificated air carrier, owns the beneficial interest in a substantial number of shares of the stock of National Airlines, Inc. ("National"),

which stock has been the subject of prior proceedings of this Board. National is an active competitor of Northeast.

7. At all times since 1955 respondents Metropolitan, Equitable and Irving have been and are now persons engaged in a phase of aeronautics within the meaning of the Act and may not lawfully under the Act acquire or maintain control of an air carrier, directly or indirectly in any manner whatsoever, by reason of activities which included the following:

(a) Upon information and belief, at all times since 1955 the major airlines of the United States have been and are now dependent upon Equitable, Metropolitan and Prudential Life Insurance Company of America ("Prudential"), the country's second largest insurance company, for long-term senior financing and said insurance companies have dominated, and now dominate, the supplying of such financing to the major air carriers of the United States. This dominance has arisen in part from the historic interest of said insurance companies in airline financing, in part from the recognition and enforcement of the traditional lender concept and in part from the vast amounts of financing required by the major airlines, particularly in connection with the acquisition of jet flight equipment. Upon information and belief, since 1955 none of the country's five largest air carriers has arranged any senior financing other than bank financing without the participation therein of one or more of said three insurance companies.

[3790] (b) Metropolitan is, and, upon information and belief, for many years has been, the country's largest supplier of financing to air carriers.

As at December 31, 1960 it held obligations of said carriers in a principal amount in excess of $288 million. Included in such obligations were those of four of the country's five largest air carriers, including TWA.

(c) Equitable is, and, upon information and belief, for many years has been, the country's third largest supplier of financing to air carriers. As at December 31, 1960 it held obligations of said carriers in a principal amount in excess of $188 million, including obligations of TWA.

(d) As at December 31, 1960, Metropolitan held senior obligations of air carriers other than TWA in a principal amount in excess of $250 million and Equitable held such obligations in a principal amount in excess of $144 million.

(e) As at December 31, 1960, Metropolitan held in excess of 46% and Equitable in excess of 28% of the senior long-term debt of the country's five largest air carriers.

(f) Irving is a large commercial bank of metropolitan New York actively engaged in financing transactions with airlines. Not only has it been the lead bank for TWA for many years but in recent years it has attempted aggressively to increase its participation in the financing of other air carriers, particularly local service carriers. It has also been an active participant as agent in other credit transactions with airlines. In 1962, for example, Irving acted as agent for a group of banks to refinance the existing debt of National, as a result of which relationship one of Irving's vice presidents, G. Robert Truex, Jr., was elected to the Board of Directors

of such airline. Irving is and has been actively engaged in financing persons engaged in other phases of aeronautics.

(g) Metropolitan, Equitable and Irving have been engaged for many years in financing persons engaged in phases of aeronautics other than as air carriers.

(h) The acquisition of control of TWA in the manner hereinafter set forth.

PART TWO.

The Litigation.

8. On June 30, 1961, TWA filed a civil complaint in the United States District Court for the Southern District of New York (Civil Action No. 61-2324) claiming violations of the antitrust laws by Toolco, Howard R. Hughes, Toolco's sole stockholder, and Raymond M. Holliday, an executive officer and a director of Toolco, and seeking, among other relief, divestiture of Toolco's 78% stock interest in TWA. Such alleged violations of the antitrust laws relate to the control allegedly exercised by Toolco over the acquisition and financing of jet and other flight equipment by TWA. Toolco has filed a motion to dismiss TWA's complaint in said action (the "action"), which motion is now pending before the Court.

9. On February 13, 1962, Toolco filed its answer and counterclaims in the action. In its counterclaims Toolco sought damages and injunctive relief not only on its own behalf but also derivatively on behalf of TWA by reason of the acts and conduct of the Respondents herein (other than Pan Am and Trippe) who were named as additional defendants on said [3791] counterclaims (said Respondents being hereinafter sometimes referred to as "the Additional

Defendants"). Such acts and conduct include an alleged conspiracy among the Additional Defendants in violation of the federal antitrust laws to seize and maintain control of TWA for the mutual advantage of the Additional Defendants and also include the making of agreements by which Metropolitan, Equitable and Irving obtained and maintain control of TWA in violation of Section 408 of the Act. A copy of said answer and counterclaims is annexed hereto as Exhibit "A" and made a part hereof by reference.

10. Upon information and belief, the opinion and decision of the United States Supreme Court in *Pan American World Airways, Inc.* v. *United States*, 31 U. S. L. Week 4124 (Jan. 14, 1963) grants to this Board the exclusive primary jurisdiction to determine whether the establishment or maintenance of a control or interlocking relationship between or among persons subject to the jurisdiction of the Board under Sections 408 or 409 of the Act, or alleged unfair methods of competition by persons subject to the jurisdiction of the Board under Section 411 of the Act, are or are not consistent with the public interest as defined in the Act and, accordingly, whether an action under the antitrust laws based in whole or in part thereon may be maintained. Toolco thus is filing in the action a motion to stay all proceedings with respect to its counterclaims, pending the investigation, hearing and determination requested by its complaint herein. By reason of their interest in this proceeding Toolco has named as parties hereto all of the Additional Defendants.

PART THREE.

The Acts and Conduct of Respondents.

11. Equitable at all times since November 30, 1945 has been the traditional senior lender to TWA. On said

date TWA, while under the presidency of Jack Frye who at that time nominated TWA's directors, sold to Equitable $30 million principal amount of debentures. At all times since said date Equitable, by reason of the provisions of various indentures and amendments thereto, has had the power to control all of TWA's equipment acquisitions and financing transactions of any significance through the giving or withholding of its consent to such acquisitions or transactions. Moreover, upon information and belief, prior to 1956, lending institutions including Equitable, Metropolitan and Prudential entered into an understanding and agreement that (i) none of such lending institutions would supply financing to an airline except with the consent of the traditional senior lender to that airline and (ii) if the traditional senior lender to an airline refused to supply such financing except upon particular terms none of such lending institutions would supply financing on any terms. By reason of such agreement and understanding and by reason of Equitable's power to withhold its consent as aforesaid, Equitable has been in a position (i) to dictate and has dictated the financing methods to be employed by TWA and from whom such financing could be acquired and (ii) to foreclose TWA from obtaining financing except upon terms acceptable to Equitable.

12. Irving, for many years prior to 1960, was the principal bank for Toolco and for its sole stockholder, Hughes, as well as for TWA. Commencing in or about 1955 Irving undertook to provide financing to TWA and has dominated the supplying of short-term financing to TWA. Moreover, commencing prior to 1960 Irving used its legal power as a lender to control decisions and acts of Toolco with respect to TWA and Irving used its position as the lead banker for TWA to increase TWA's dependence upon it as a source of short-term credit and to control which banks could supply TWA's short-term credit needs.

[3792] 13. Metropolitan on or about March 21, 1960, was invited to participate in the then contemplated TWA financing because Dillon Read advised that in view of the size of such financing it was necessary to obtain the participation of either Metropolitan or Prudential. Metropolitan assumed a dominant and unyielding position on virtually all of the terms and conditions of said financing. Upon information and belief, Metropolitan (i) in 1960 insisted that the interest rate on financing to be supplied by it and Equitable should be 6½%, (ii) was a dominant force, if not the dominant force, in the decision reached by the lenders in 1960 to demand a voting trust with respect to Toolco's stock in TWA of which voting trust (the "Voting Trust") it and Equitable through Irving as agent would name a majority of the voting trustees and (iii) demanded and insisted upon a premium in the initial amount of 22% as a condition to any refunding of the loans to be made by it and Equitable to TWA, thereby precluding Toolco from terminating the voting trust except upon the payment of such a premium.

14. Trippe, who as hereinabove set forth, controls the acts and activities of Pan Am, has been for several years and is now a director of Metropolitan and a member of its finance committee which, upon information and belief, exercises supervisory control over loans and lending policies of Metropolitan including loans to airlines including TWA. Robert V. Fleming and Robert L. Hamill are, upon information and belief, close associates of Trippe, and are also directors of both Metropolitan and Pan Am. Upon information and belief, they have consistently combined with him in decisions made and actions taken by Pan Am and Metropolitan. By reason of the aforesaid interlocking relationship between the Boards of Directors of Pan Am and Metropolitan, Trippe has been in the position to direct or influence the policies and actions of Metropolitan with

respect to other air carriers and persons engaged in other phases of aeronautics, including TWA and Toolco.

15. Prior to 1945, Pan Am under the domination and control of Trippe bitterly opposed the awarding of international routes to TWA. At all times since such routes were awarded to TWA, Pan Am has sought to remove TWA as an international competitor. It has, moreover, repeatedly sought to acquire domestic routes for itself.

16. Upon information and belief, in 1960 the Additional Defendants other than Tillinghast and Breech entered into various agreements and into a conspiracy to obtain and maintain control of TWA for their mutual advantage, including the use of TWA as a captive market for the supplying of senior financing upon terms advantageous to the lenders. Said agreements and conspiracy are reflected in part in paragraphs 78 through 94, inclusive, and paragraph 111 of Exhibit "A" hereto, which paragraphs are included herein by reference. As a result of the acts and activities of said conspirators, Toolco in December, 1960, was compelled and coerced into placing the common stock of TWA owned by it in a lender-controlled voting trust and to agree to other demands of the conspirators, including the demand insisted upon by Metropolitan that Toolco could acquire all the senior indebtedness to be incurred by TWA and thereby terminate the Voting Trust, only upon the payment of a premium initially in the amount of 22% of the principal amount of the indebtedness of TWA to Metropolitan and Equitable, namely, $20,416,000.

17. By reason of the agreements and transactions entered into in December, 1960, and the Voting Trust then created, Equitable and Metropolitan, together with other lending institutions including Irving, acquired [3793] and now possess control over the business and affairs of TWA

and, directly or indirectly, are exercising it. They have the right and power at any time to remove and select a successor to either or both of the voting trustees whom they have chosen. The majority of voting trustees who are thus subject to their control in turn have the absolute right and power under the by-laws of TWA at any time to reconstitute TWA's Board of Directors without cause by altering the number of directors, by removing the entire Board of Directors at will, and subject to certain qualifications, by removing one or more directors. The majority voting trustees have used the power so given to them to reconstitute TWA's Board of Directors and the members of said Board of Directors as presently constituted have been chosen in accordance with the wishes and with the approval of Metropolitan, Equitable and Irving.

18. Since December, 1960 Breech, who was chosen as a voting trustee by Metropolitan and Equitable through Irving as agent, and who thereafter caused himself to be elected chairman of the TWA Board of Directors, and Tillinghast who was selected by Breech and was elected president of TWA only after approval by Metropolitan, Equitable and Irving, have joined in the aforesaid conspiracy and together with the other Additional Defendants have entered upon a course of conduct designed and calculated to perpetuate the control of TWA by the Additional Defendants through perpetuating the Voting Trust, through frustrating the option which they gave to Toolco in December, 1960 to terminate the Voting Trust by acquiring the senior indebtedness of TWA then created and paying the aforesaid 22% premium, and through other means which, to the extent then known to Toolco, are described in part in paragraphs 53, 95, 96 and 98 of Exhibit "A" hereto, said paragraphs being incorporated herein by reference.

19. In 1962, in furtherance of the conspiracy hereinabove set forth, TWA and Pan Am entered into negotiations looking toward a merger or other arrangement for the consolidation of the routes and operations of Pan Am and TWA. Upon information and belief, Metropolitan through Trippe, or Trippe with the support of Metropolitan, initiated and actively fostered such negotiations. Such negotiations, upon information and belief, were conducted on behalf of TWA by Tillinghast, Breech and others not because such an arrangement would necessarily be in the best interests of TWA and all of its stockholders or preferable to other mergers but because under the proposed arrangement with Pan Am, Toolco would be permanently eliminated as the controlling stockholder of the resulting airline. Negotiations between TWA and Pan Am culminated in an agreement which was executed on December 19, 1962 and is the subject of the application filed with this Board in Docket No. 14229. By the terms of said agreement the owners of TWA, including Toolco, would be disenfranchised from exercising normal voting rights with respect to their shares in the resulting airline since control of said airline would be in the hands of a holding company of which the present Pan Am stockholders would own all the shares.

20. Although Toolco takes no position at this time with respect to the merits of the proposed agreement or some other agreement or arrangement for a merger of Pan Am and TWA, upon information and belief, said agreement and arrangement was entered into by Pan Am for the purpose of either eliminating TWA as an international competitor or of lessening the effectiveness of competition by TWA in the event such agreement was not ultimately approved.

21. By reason of the foregoing and under the control of Respondents as hereinabove set forth, the business and

affairs of TWA have steadily declined, TWA has obtained equipment which it does not need and has not obtained equipment which it does need, TWA has been saddled with [3794] indebtedness in an excessive amount and upon terms which it finds itself able to meet with difficulty, if at all, and the management policies and methods of operation of TWA have rapidly deteriorated. During the years in which Toolco nominated a majority of the directors of TWA, namely from 1947 through 1960, the business of TWA grew steadily. From 1947 through 1960 TWA's operating revenues grew more than four times. In 1960 TWA had earnings before taxes in excess of $15,000,000. During the years from 1947 through 1960 TWA realized earnings before taxes of $95,600,000. In 1961, TWA's first year under a voting trust, however, its net operating loss before income taxes was in excess of $28,000,000, without regard to accelerated depreciation on piston aircraft and before applicable tax credits, or an adverse change from 1960 in excess of $40,000,000. Furthermore, TWA's net loss before income taxes in 1962 was in excess of $10,000,000 and, on information and belief, would have been in excess of $15,000,000 but for alterations in methods of accounting.

22. By reason of the foregoing TWA has suffered and is continuing to suffer substantial damages in its business and property, the exact amount of which is presently unknown to Toolco.

23. By reason of the foregoing, TWA is and has been under the control and domination of Respondents, TWA is not free in its own behalf to bring this complaint, and any request by Toolco of the management of TWA or its Board of Directors for TWA to bring the complaint would be unavailing.

PART FOUR.

Request for Prompt Action.

24. By reason of the exclusive primary jurisdiction of the Board over the subject matter of Exhibit "A" hereto Toolco believes that it is no longer in a position to prosecute in the courts any claim against the Respondents until a final non-reviewable order has been entered by the Board herein. Toolco, accordingly, requests that this complaint be accorded expedited treatment and as prompt a hearing as the circumstances permit.

PART FIVE.

Relief Requested.

WHEREFORE, Toolco prays:

(A) That the Board institute an investigation pursuant to the provisions of Sections 408 and 1002 of the Act for the purpose of:

(1) Determining whether the acts and conduct complained of have resulted or will result in

(a) acquisition or continuation of control of TWA for which Board approval pursuant to Section 408 of the Act is required but has not been obtained;

(b) acquisition or continuation of common control of TWA and Pan American for which Board approval pursuant to Section 408 of the Act is required but has not been obtained;

(c) interlocking relationships which are in violation of Section 409 of the Act;

[3795] (d) interlocking relationships which should now be found to be against the public interest;

(e) unfair methods of competition in violation of Section 411 of such Act; or

(f) other violations of the Act.

(2) Determining whether such acquisition or continuation of control, common control, interlocking relationships or unfair methods of competition, or other violations, if any, and the acts and conduct set forth in Exhibit "A" hereto, are consistent with the public interest and fulfill the conditions of the Act; and

(3) Entering any such order or taking any such further action herein as may be appropriate pursuant to the provisions of the Act;

(B) That the Respondents, TWA, and the Voting Trustees, E. Chester [illegible]eet of South Port, Connecticut, and Theodore V. Hou[illegible] of Fredericksburg, Virginia, all be made parties to this proceeding;

(C) That, pending such investigation, the Board immediately order Respondents to show cause why they should not be required to cease and desist from the acts and conduct described hereinabove; and

(D) That such other and further relief be granted as the Board may consider appropriate in the premises.

Respectfully submitted,

/s/ CHESTER C. DAVIS

CHESTER C. DAVIS,
Office & P. O. Address,
120 Broadway,
New York 5, N. Y.
Attorney for
Hughes Tool Company.

[3796]

VERIFICATION

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

I, the undersigned, CHESTER C. DAVIS, Attorney for Hughes Tool Company, hereby certify that I have read the foregoing complaint and Exhibit A attached thereto and know the contents thereof, that the matters and things therein stated are true of my own knowledge, except as to those matters stated therein to be on information and belief, and as to those matters I believe them to be true.

/s/ CHESTER C. DAVIS

CHESTER C. DAVIS

[SEAL]

Pretrial Hearing, February 8, 1963

[24882]

[CAPTION] 61 Civ. 2324

Before: Hon. CHARLES M. METZNER, District Judge.

New York, February 8, 1963, 5:00 p.m.

[APPEARANCES]

• • •

[24884] The Court: This hearing has been called at the request of Mr. Sonnett, I understand, based on Mr. Davis' communication with the Special Master, which is contained in a letter to me from Mr. Davis, stating that Toolco had elected to rest on the merits of its positions and decided not to proceed with the deposition in California. Attached to that letter is a notice of the position of the defendant Tool Company.

Mr. Sonnett, do you want to start off by telling the Court why you requested this conference?

Mr. Sonnett: Yes, your Honor. The difficulty I have had with the documents to which your Honor has referred is that I don't understand them, I don't know what they mean. I do not know whether this consists of a representation to the Court that Mr. Davis has been authorized by his client to apply for leave to withdraw his answer and consent to the entry of a default judgment for the relief requested in the complaint, in which event, if it were that, I would have a position to express; or I don't know whether on the other hand it means that they are just proposing to take no further [24885] action on behalf of the Tool Company in the case and that they will not be present accordingly for

Mr. Hughes deposition on Monday; and since he has been noticed and is under subpoena to appear as a witness, I think if they do not appear on Monday I would regret not having the pleasure of their company but the attendance of the Hughes Tool Company at that deposition is not at all necessary of course. They can waive their right to cross examination of Mr. Hughes if they so elect.

Not knowing what this document means, and since we are all prepared to go, indeed, I have six or eight people out there—I have had for five or six days—and since Judge Hall would certainly want to know whether there is going to be any change in the date, and since I see no reason in these documents for any change in the date, unless the proposal is to enter a default judgment, it seemed to me desirable to try to clarify it by a hearing before your Honor today.

If it is an application for the withdrawal of the answer and for leave to have a default noted by the Tool Company, TWA would move for the entry of a default judgment for the relief in [24886] the complaint.

I would have an application by way of amendment on the prayer for damages because of their counterclaims, which allege that the damage to TWA was $45 million, our complaint alleged we thought it was in excess of thirty-five. Our investigation to date satisfies us that the $45 million damage figure is correct, so we would move for leave to amend the damage prayer and for a default judgment with the relief sought in the complaint, if in fact what they are proposing to your Honor is that their default in this case be noted.

If it is not that, I don't know what it is. That is my problem, your Honor.

The Court: Mr. Davis?

Mr. Davis: Your Honor, I think that it might be desirable for the record for me to particularly call to your

attention a ruling of the Special Master in connection with this notice for the taking of the deposition of Mr. Hughes in California and my acceptance of the subpoena. It has a bearing on what I am about to say with respect to the decision of the Tool Company and their understanding of the consequences which have been explained [24887] to my client.

I am referring to page 99 of the transcript of a hearing before the Special Master on Sepetmber 15, 1962. Since I don't know that your Honor has that before you, may I read it? It isn't very long.

The Special Master stated at that time:

> "I feel that there is such a close connection between Mr. Hughes, as evidenced by some of the documents that I have seen, and the fact that he is the sole owner of the Hughes Tool Company, that the Hughes Tool Company is responsible for Mr. Hughes with regard to this subpoena, and its validity and whether it is an authorized act, and I advise and instruct counsel for the Hughes Tool Company to write Mr. Hughes and inform him about my construction of this subpoena, and that I will consider it an express waiver if he fails to communicate with the Court promptly and advise of any other construction of the subpoena, either as to its validity or when he should be required to appear, and if at any future time in this case Mr. Hughes should claim that the service of such [24888] subpoena was not authorized, not a valid instrument, not binding as I am construing it, I shall entertain a motion to strike the answer of the Hughes Tool Company and enter judgment against it in this proceeding."

Before I go further, your Honor, may I say that the acceptance of the subpoena on behalf of Mr. Hughes was

valid, never was questioned, and I also followed the directions of the Special Master.

May I continue now?

> "It is very difficult for me to try to do equity to all the parties in this proceeding. Everyone claims he wants to be first.
>
> "I recognize what the Court has said about the validity of the subpoena in Los Angeles, or assert in any way, shape or form that he is not now personally subject to that subpoena, he must do so by a written communication to you.
>
> "I ask that you include in that direction also a response to the question of documents, because it is also a subpoena duces tecum. I think we are entitled to have a report directly from Mr. Hughes to you on that subject, since [24889] there is nobody speaking for Mr. Hughes individually as counsel present."

And then he continued as follows:

> "I will incorporate in my direction to counsel for the Hughes Tool Company"—

Now I am reading at page 181 of the same day, September 15, 1962, by the Special Master:

> "I will incorporate in my direction to counsel for the Hughes Tool Company the order that if Mr. Hughes does not accept the interpretation I place upon the subpoena, and the authority for service of that subpoena, and the requirement to produce documents under it, that he so inform the Special Master by Friday of next week.
>
> "I am imposing that responsibility for giving that notice upon counsel for the Hughes Tool Company,

because I am piercing the corporate veil as to the Hughes Tool Company, and I am bringing what I hope is clear notice of very substantial sanctions, not against Mr. Hughes, but against the Hughes Tool Company, in case there should be at some later date a claim of lack of authorization or failure to respond to [24890] the subpoena because of any such claims, either as to personal appearance when the Court would order, or as to the production of documents."

I don't think that the balance is pertinent to the point that I am making.

The Hughes Tool Company is aware of those rulings of the special master, and the Tool Company did not seek a review of those rulings of the special master by the Court and accepted in effect the responsibility placed upon it by that ruling.

I have also had occasion to describe to my client, the Hughes Tool Company, the sanctions available under the Rules by reason of a respectful declination or election to stand on the questions of law which have been decided to date and not to proceed any further with respect to discovery proceedings. I have particularly called to their attention the provisions of 37(d)—Rule 37(d)—of the Federal Rules, with respect to the sanctions which could be applied by the Court on the Tool Company.

Now your Honor, following the decision of the Court of February 6th denying the motion to dismiss on the grounds there presented, and the [24891] further decision of the Court to deny the application of Tool Company for a determination which would have given the Tool Company an opportunity—so the Court of Appeals have granted the request—to obtain a review of those orders, the Tool Company concluded and advised me that, based upon the expenses which have occurred to date and which it believes

it will incur, both directly and indirectly as a 78 per cent owner of TWA, those determinations by the Court amount, so far as they are concerned, to a very substantial money judgment, as a practical matter.

They further stated, and advise me, that they do not believe that under the allegations of this complaint TWA would be likely to be able to prove damages by reason of this alleged course of conduct; that that would not be equal to—or, rather, put it the other way, that these expenses that they anticipate they believe would equal, if not exceed, what they believe are the maximum amount of damages that TWA would be able to prove.

Accordingly, I was instructed to take the position that I have indicated by this notice of position.

Now, if there is any question about the [24892] language that is to be used to effectuate what the determination by the Tool Company is, I am perfectly prepared to clarify it in any way possible.

There is only one thing I want to make perfectly clear on the record. The purpose of the position of the Tool Company, which it is taking, is to have an opportunity to obtain a review on the questions of law involved based upon the proceedings had to date; and, therefore, I have tried to prepare a piece of paper which would not preclude or prejudice the rights of the Tool Company to such an appellate review.

The Tool Company does want to rest on the merits of its position, and it does so fully aware of the sanctions which the Court, in its discretion, may impose upon the Tool Company; and if there is anything I can say that will further clarify what the effect is of the position which the Tool Company is taking, I am prepared to do so.

Now, obviously Mr. Sonnett, I am sure, is much more learned in these matters than I am, and he states the alternatives in a manner which of course I cannot accept, but

there would be no point whatever in my taking the position which I am taking in behalf [24893] of the Tool Company if I did it in such a manner as to deprive my client of an opportunity to obtain a review; and therefore we do not consent in the sense of requesting the Court to strike our pleadings or take any other action, but we are fully aware—my client is fully aware—that by insisting on a right to obtain a review on the legal questions which have been decided to date, and should it develop that they are in error, as indicated by your Honor's decisions and rulings, as a consequence they may be deprived of further defending on the merits, other than on the question of damages.

I don't know if there is anything else I can say that would help to clarify the situation. I tried to indicate as soon as I could, after the decision of the Court on February 6th. I called Mr. Rankin the next morning to advise him orally of the decision which had been made and I asked him to make that information available to the Court and to all counsel. I did ask him, however, to request counsel not to make any statements to the press with respect to that position until I was able to formulate it in words which would more or less satisfy me.

[24894] I may say, your Honor, that, working with Mrs. Lea and Mr. Cox, I had a great deal of difficulty in formulating anything that they would agree with. Apparently no matter how I tried to say it somebody was always thinking, well, if you said it this way this might happen or that might happen. At least I have been unable to find any particular precedent for something exactly like this.

The decision of the Supreme Court in the Procter & Gamble case was called to my attention, where there, of course, the government was the plaintiff, and they tried to expedite the reviewability of a determination by the Court requiring the government to produce documents by in effect inviting or suggesting to the Court an amendment to the

order requiring the production to include a provision that, upon the failure to produce the documents, the complaint would be dismissed.

Apparently the question developed procedurally up until the time it got to the Supreme Court, which was whether or not the government was then precluded from objecting to the form of order or amendment that it had submitted to the court. The Supreme Court held for the government's [24895] position that they were merely taking a procedure to avoid, I believe the expression is, "an unseemly contempt."

Well, we are trying in a way to do the same thing, but obviously I am not requesting the Court to do anything. I am merely taking a legal position on behalf of my client so as to obtain, for the reasons stated in that notice, an order or determination which is either reviewable by its terms or which the Court may feel warrants a certification under 1192(b) [1292(b)] so as to give me an opportunity to obtain a review.

I don't know if there is anything else I can say by way of explanation, your Honor, in view of what has developed.

The Court: Well, it seems to me that even though the Court did not grant you a certificate under 1292(b) you could have applied to the Court of Appeals for mandamus and, in conjunction with that application, have requested the Court to grant you a stay. I would think that the review afforded you by mandamus would be the same review that the Court of Appeals would give to any certificate I might have issued under 1292(b), because [24896] the court does not automatically take the case on appeal until the court itself has agreed with the granting of the certificate by the District Court judge. But you have not done that.

Mr. Davis: Yes, your Honor, I gave very careful and deep consideration, to be sure, in a very short period of time, and that was my initial reaction, as your Honor well

knows, when your Honor announced his decision on February 6th.

But I find myself confronted with this dilemma: the denial of my request for the statement in the opinion of the Court as to (a) the existence of the substantial question and (b) that the determination of that question would expedite the disposition of the action placed me in about as poor a position as I could conceive of to obtain a writ from the ground that they were unusual circumstances existing here which required resort to that extreme remedy.

In any event, within the time until today I did not think that I could prepare an adequate application which would give me any reasonable hope to expect the granting of a stay, and I so advised my client to that effect.

[24897] And therefore, with the very clear indications that your Honor was unwilling to consider any postponement of the date of February 11th, even assuming that I filed my writ, which would not become returnable until the next motion day of the court, which is next Monday, I concluded, I believe soundly—but I have been wrong certainly on a number of occasions—

The Court: So have I.

Mr. Davis: —here that I have no basis for a stay.

Now, if your Honor will recall—that is, I recall—when I sought to obtain a stay at a time when I thought I had some fairly persuasive grounds—that was in connection with the documents covered by the attorney-client privilege —I found that in order to even approach the Court of Appeals for a stay there would have to be some appeal pending before it.

I filed a notice of appeal, and at that time I had some authority to support my position, that the determination of the waiver of the attorney-client privilege was a legal determination of a collateral matter unrelated to the merits of the [24898] lawsuit, which therefore had that sense of

finality to it under the doctrine, I believe, expressed by Mr. Justice Jackson.

My opponents made a motion to dismiss that appeal on the ground that it was not an appealable, reviewable order, and I tried to cover that position, but it was announced in the morning that they got a delay until later that day and indicated that they were going to bring on on that same day a motion to dismiss my notice of appeal. I tried to cover by a writ of prohibition and mandamus.

Then Judge Bromley, apparently knowing the procedure better than I did, took the position that apparently you have to obtain leave before you file a writ of prohibition and mandamus. Well, I have been through one of those before without obtaining any leave just by filing it to see what determination the court made.

In any event, the court on that occasion concluded that my notice of appeal was to be dismissed, considering the question non-reviewable, denied leave to file the writ of prohibition and, of course, denied the stay; but at that point there [24899] was nothing for them to stay to protect their jurisdiction.

So that so far as obtaining a stay of incurring the burden and expense of moving out to California and then undertaking what is their [*sic*] contemplated, I had to advise my client that I had no alternative; and then based upon, as I say, an estimate, an analysis of the amount of expenses that would be incurred, assuming that we continued with the trial on the merits, both in pretrial proceedings as contemplated and at the trial, together with the fact that we indirectly stand 78 per cent of the expenses that TWA is incurring, and based upon the fact that the Tool Company at least believes that, assuming for this purpose there is a violation of the antitrust laws and having controlled or dictated the type of equipment or financing that TWA entered into, the question is how was TWA injured—and

after all, we were 78 per cent owner at the time, and I know that my friend Mr. Sonnett has some very interesting theories about how those damages built up, including the fact that we made money by one or two tax savings; but I don't follow that reasoning in the concept [24900] of damages that would result from these various allegations—in any event, rightly or wrongly, the Tool Company concluded that to stand the burden and expense that would be involved, being in the peculiar position of paying both the expenses of the plaintiff, or 78 per cent of them, and its own defense, the inability to obtain a review at this time is tantamount, as far as they were concerned, to a very substantial sum of money, and it is several million dollars, your Honor, that they concluded was involved, more than $5 million, your Honor.

I resisted the figure that they came up with, and I am trying to get a further idea of how they arrived at that figure, but I have been assured, upon checking and double checking, that that is the minimum that would be involved, and before attempting to address itself as to the probable amount that TWA would be spending.

Under those circumstances, the Tool Company felt that, as a business decision, it would be preferable to stand on the validity or the merits of our positions to date, and to then obtain some form of reviewable order, depending, of course, on the type of determination that the Court may make by [24901] reason of the position being taken by the Hughes Tool Company.

The Court: Do I understand your statement to the Court, which is not embraced within your notice of position, which is the only official document I have from you, your letter of transmittal—

Mr. Davis: I am sorry, I can't hear you, your Honor. I am very bad today.

The Court: Well, I will raise my voice, Mr. Davis.

The only document before the Court is the notice of position. Do I understand you to say that embraced within the contemplation of this notice of position is your informing the Court that Mr. Hughes will not appear for deposition on Monday, February 11th?

Mr. Davis: That is correct, your Honor.

The Court: And therefore the plaintiff may take whatever proceedings it is advised to take by way of sanctions under Rule 37?

Mr. Davis: That is correct, your Honor.

The Court: What about the counterclaims?

Mr. Davis: On the counterclaims, your [24902] Honor, as your Honor will recall, I have a motion pending to stay—not to dismiss but to stay—those counterclaims until after a determination has been made by the CAB pursuant to a petition—application filed before the CAB, and your Honor will recall that you put over the hearing on that motion to February 18th at the request of Mr. Hupper.

Now, the position of the Tool Company with respect to these additional defendants is comparable, but let me make one thing clear for the record, your Honor, in case it may not be in the forefront of your mind.

The notice for the taking of depositions of the Tool Company, or of Mr. Hughes, was by TWA, it was not by the additional defendants.

Now, it is true that your Honor did say in a prior order, when the Court set forth the order in which depositions would be taken, as you recall, that the Tool Company would have the right to continue and complete the taking of the depositions of those listed on the schedule limited to the issues of the complaint, to be followed by the depositions by TWA, in which the additional defendants could, if they so desired, participate, and then they [24903] would have the right to complete whatever depositions they were entitled to take on the counterclaims, and then, finally, the

Tool Company could continue with such further deposition proceedings as it was then advised it could take.

As your Honor, I am sure, realizes even better than I do, my understanding of the decision of the Court of February 6th is that it recognized that the acquisition of control of an air carrier by someone engaged in a phase of aeronautics was clearly within the scope of Section 408 and the powers of the CAB to regulate.

The Court went on further, and, as I understand the opinion, indicated its conclusion that that did not carry to the exercise of that control, or at least not to all phases of the exercise of that control.

My understanding of your Honor's decision is clearly that at least the acquisition of control under 408 is clearly within the competence of the CAB.

I respectfully submit further, and I believe I adverted to that on February 6th, whether or not a person is engaged in a phase of aeronautics, [24904] where the word of art is used under Section 408, is peculiarly within the expertise of the CAB.

Now, the counterclaims allege and depend upon a determination that these additional defendants are in fact engaged in a phase of aeronautics as the CAB finds it to be, and that their acquisition of control of TWA was a violation of 408.

I respectfully submit that in the Panagra decision they give us no choice, as we understand that decision, but to obtain a determination by CAB as to whether or not that conduct, that acquisition of control, was or was not something which they are prepared to find in the public interest and to which they are prepared to give exemption from the antitrust laws, because the very issue in Panagra was the contention that there had been conduct in violation of the antitrust laws prior to any approval by CAB. In fact, CAB, as in the Panagra decision, concluded that it did not

have the power or the means to regulate the conduct there involved, and the majority concluded that the complaint was to be dismissed, or presumably, upon appropriate proceedings before the CAB; and should the CAB conclude that the conduct of Pan American [24905] and Grace was outside of the public interest or their willingness to approve it, then presumably a proper antitrust claim would then be assertable.

I also read the minority opinion and the two dissenters as not agreeing with the majority on the question of primary jurisdiction.

In any event, it is the position of the Tool Company that the counterclaims may not be effectively pursued at this time in this form, and the relief we are requesting in that regard, and which I was hoping to prepare myself to argue on February 18th, was to obtain from the Court an appropriate order which I believe is by leaving the matter docketed but staying all further proceedings therein until after the preliminary questions have been decided.

Your Honor will note that in the application to the CAB we are requesting expeditious treatment.

The Court: I cannot follow you on your argument, Mr. Davis, in the first place, because I think it is clear that by virtue of my decision the CAB does not have exclusive primary jurisdiction in this matter.

[24906] Secondly, your first counterclaim is predicated on self-dealing between TWA and the additional defendants.

Your second counterclaim does state it is predicated on Section 408 of the Federal Aviation Act.

Your third counterclaim is the ordinary, simple derivative stockholders suit based on violations of the antitrust laws.

And the fourth counterclaim seems to be a claim for individual relief predicated on the activities set forth in the third counterclaim.

So I do not see how these counterclaims come within the jurisdiction of the CAB.

Mr. Davis: Your Honor, the thing that comes within the jurisdiction of the CAB is the legal effect of what the CAB presumably has the power to do, and that is to determine that to the acquisition of control, which is underlying the capability of obtaining any relief from the Court, confronted with the necessity of first having a preliminary determination by the CAB as to whether or not the acquisition of the control, which is what involves self-dealing, whether or not the violation of 408 and whether or [24907] not the alleged violation of the antitrust laws by the conduct that allegedly was engaged in, gives me, or whether or not the CAB, by finding, as they may find, that the acquisition of the control was within the public interest and grant them immunity under 414.

I read your Honor's decision—you are more of an expert than I am—to hold that there is no question about the exclusive, much less primary, jurisdiction of CAB to apply 408 with respect to the acquisition of control. Where I understand that we lost your Honor was in connection with the question as to whether or not the CAB had exclusive or primary jurisdiction to evaluate the conduct following the acquisition of control by reason of the manner in which the control was exercised.

The Court: Well, I disagree with your interpretation of my opinion. But let's get back to the third counterclaim, which is a simple derivative minority stockholders suit based on violations of the antitrust laws.

Mr. Davis: And if the CAB should determine, based upon this application now pending before it, that the acquisition of control by [24908] these additional defendants was in the public interest, they could grant them immunity from the antitrust laws under 414.

The Court: Well, are you saying you came into court

a year ago to sue the additional defendants and now you say, well, now, why, we are suing the additional defendants here for a money judgment. Maybe you don't have jurisdiction, Mr. Southern District. We are going down to Washington to see if what we claim is wrong is really all right.

Mr. Davis: Your Honor, the situation at the time we filed these counterclaims was, and I believe a number of people believe, that the granting of exemption by the CAB could only apply when the CAB acted. And thereafter, it was my understanding, and I believe it was the understanding of a great many members of the bar more learned than I am in this field—I am talking now of the aviation field particularly—that prior to the Panagra decision the exemption from the antitrust laws was predicated upon affirmative action by the CAB.

Now, there has been no affirmative action [24909] taken by the CAB with respect to the acquisition of control by these additional defendants. It was not until the Panagra decision came down that I was confronted with the fact that even though the CAB had not acted, and as the court, as I read the Supreme Court majority opinion, stated, it would be odd, I believe is the expression, that something which the CAB could find to be in the public interest and could grant exemption under the antitrust laws should run afoul of the antitrust laws and that the two systems collide, because what position can we be in if the conduct of the past can be, shall I say, blessed by the CAB? What kind of time, money and effort am I spending here trying to establish factually a violation of the antitrust laws if then the next day, or while I am doing this, the CAB, not necessarily at my instance but at the instance of the additional defendants, on its own motion should determine that the acquisition of control over this air carrier was in the public interest.

When the Panagra decision came down I found that the only alternative that I had, since I know how they would like to dispose of these kinds of claims, was for me to file an application with the [24910] CAB requesting them to take appropriate action, and I did that by a petition which annexes this very counterclaim, to explain to them, as I believe my petition does, that it was the belief of the Tool Company that it was necessary to obtain such a determination before we would be free to pursue our relief in the courts.

I also pointed out to your Honor that it would be impossible for me to take any other position and still maintain my position with respect to the complaint against the Tool Company. I wish to be sure that I lost before your Honor but I hope at some point I may have an opportunity to a review before an appellate court on that, and I certainly am not going to take any inconsistent positions.

Now, I respectfully submit to your Honor that the determination that was made by your Honor with respect to the both legs of the decision relating to our motion to dismiss the counterclaim—I am referring to our motion on the basis of approval in fact by the CAB, and then our basis of primary jurisdiction with respect to the conduct subsequent to approval—there is also inherent, as Mr. Hupper, [24911] I believe, was arguing on February 6th, that the nature of the conduct claimed, which we claim has been a violation of the antitrust law by these defendants, is not the same as the conduct which is claimed under the complaint even though they arise out of the same transaction.

In other words, this complaint and counterclaim all relate to the acquisition and financing of aircraft by TWA. On the one hand the TWA, under the present management, is claiming that the Tool Company, notwithstanding the fact that every transaction between the Tool Company

and TWA was in fact approved, which they admit, by the CAB, nevertheless the manner in which we dictated the acquisition of their aircraft and financing precluded it being done some other way and was a violation of the antitrust laws.

We, on the other hand claim that these aircraft that were acquired and the manner in which they were financed were in fact dictated and controlled by these additional defendants, and ever since back in 1945, I believe, when the Equitable became the first senior lenders it was in a position to veto any financial transaction by TWA for any [24912] acquisition of aircraft.

But the conduct that is brought about is different. Whether or not the financing of any airline or the obtaining of equity money is monopolizing the market is a question, to be sure, but I don't see how the Tool Company can be expected to spend the time and money to prosecute these claims here if the CAB should turn around and say, oh, we think what these additional defendants have done is in the public interest, your Honor, and in your own opinion you quote in part, to be sure—not the part that we referred to in the 1960 order—

The Court: You look at footnote 20. I put it at footnote 19.

Mr. Davis: In mine it was 20.

The Court: Mine was 19.

Mr. Davis: Did it supersede 19?

The Court: No, I don't think so.

Mr. Davis: Well, in any event, your Honor, that is the position of the Tool Company with respect to these additional defendants. And, to be sure, after we have what I hope will be a fuller argument of the question on the 18th, your Honor may make some determination at that time with respect [24913] to how you want to dispose of these counterclaims.

But so far as this current February 11th date is concerned, the right of the additional defendants to participate in any depositions is dependent upon the right of TWA and based upon their notice, and I have indicated the Tool Company has taken an irrevocable position at this time which puts the plaintiff to whatever relief they are entitled to based upon that position.

Mr. Bromley: Your Honor, Mr. Davis has now told you twice, and I think he said this three times before, that my right to examine Toolco through Hughes is some way dependent on TWA's right, and he has told you four times that I have never served a notice to examine Toolco through Hughes.

You know, I think, full well, because I have said it many times, that it was nearly a year ago, to wit, on February 13, 1962, that the clients represented by me, the additional defendants represented by me, served an appropriate notice under the appropriate rule to examine Toolco through Hughes, and we are entitled to have him there on Monday for that purpose, and unless Mr. Davis tells [24914] your Honor that he is now prepared to consent to a dismissal of his counterclaim with prejudice, then we are entitled to go ahead on Monday.

Of course, some of the other additional defendants served the same notice. Mr. Chanler's clients and Mr. Stewart's clients served the same notice. So I don't understand his constant repetition of a statement that Mr. Davis must know is not true, that is to say, that we have no independent right to examine Hughes, and he has not yet said whether Hughes is going to show up on Monday in response to that notice or not.

Mr. Davis: Your Honor, apparently Judge Bromley has misunderstood me or—

Mr. Bromley: I don't think I misunderstood you. You said it twice.

Mr. Davis: I never claimed that the additional defendants did not have an independent right to examine anyone they saw fit to examine. What I meant to say, if I did not say that that way, was that the notice for the taking of Mr. Hughes' deposition, which has been adjourned or put over until February 11th, and the subpoena, which I accepted on behalf of Mr. Hughes, relates to a [24915] notice for the taking of a deposition of Mr. Hughes, was served upon us or filed in California by TWA and not by the additional defendants. I was not intending to convey the impression that you are not in possession of some independent rights.

The Court: I have a distinct recollection—if I have a minute, I will find it—that in one of my pretrial orders I indicated that on the adjourned date, after TWA had finished its deposition proceedings of Mr. Hughes, the additional defendants would be entitled to proceed with their deposition. That is in an order of the Court.

Mr. Bromley: That's right. The occasion for that was an appeal from our notice, from the special master's decision with respect to our notice.

Mr. Davis: I believe, your Honor, that you may be referring to the March 8th order, because that is the one, I believe, that set out the order in which the various interests were to have the right to take depositions. I believe that is my recollection.

I don't have the March 8th order with me, your Honor, but if you have that before you, you [24916] may find that that is what you have in mind.

The Court: I have it.

I am sorry, I can't find it offhand, but I have a distinct recollection.

Mr. Chanler: On January 10th, your Honor.

Mr. Bromley: Entered and filed March 6, 1962, your Honor.

The Court: Page 41

Mr. Bromley: Page 4, yes, sir.
The Court:

> "The defendant Hughes Tool Company may continue the deposition scheduled, limited, however, to evidence which bears on plaintiff's claims against Hughes Tool Company. Since the special master has been presiding over the depositions on a day-to-day basis, he will see to the application of this limitation, and upon completion of this phase of defendant's depositions the plaintiff shall proceed with its depositions in the order provided in the pretrial order of February 7, 1962. The additional defendants may participate in such depositions conducted by the plaintiff and in furtherance of their own [24917] deposition proceedings, or may separately schedule such depositions to follow upon the completion of plaintiff's depositions."

Mr. Bromley: That is what I referred to, yes, sir.
The Court: Do you wish to add anything else, Judge Bromley?
Mr. Bromley: Yes, sir.
I think it is important to call your attention to the fact that later on, in January, 1963, on page 3 of that order of your Honor's, at a pretrial hearing held on January 9th, you said:

> "The deposition of Howard R. Hughes by the plaintiff and the additional defendants should now go forward."

The Court: That is not on page 3, is it, Judge Bromley?
Mr. Bromley: Page 3, the middle of that long paragraph, sir, beginning: "During the 10-month period the defendant has conducted over 80 days. . ."

The Court: Yes, I knew I had made some reference to it in the January 10th order.

Mr. Bromley: That is it.

[24918] So I intend to go to California tomorrow, and I would like the Special Master to be there Monday morning so that I may note an appropriate default under my notice, and I am sure—

Mr. Chanler: I join in that request.

Mr. Stewart: And I join in that request.

Mr. Harrell: Similarly on behalf of Mr. Tillinghast.

Mr. Sonnett: May I briefly advert to your Honor's question about the counterclaim, counterclaim 3.

In all of the procedural maneuvering that appears to be going on I think it well to recall what your Honor said many months back, which was that the plaintiff should not be lost sight of in the maze of pleadings or the complexity of the pleadings that have resulted.

The TWA position is a very simple one. From the outset, and every time, in orders, notices, the subpoena that was issued by the court in California, the forged authorization, the ratification, the representations made by Mr. Davis to the Court there and here, it was represented that Mr. Howard R. [24919] Hughes, as a witness, was subject to the jurisdiction of that court for his deposition to be taken for use in this proceeding on behalf of TWA.

TWA's right to depose him, both on the complaint and answer, since the complaint still stands denied, and on the counterclaims, we think, is perfectly clear. Indeed, it has been ordered repeatedly by this Court.

I am not aware that there was any counsel in this room representing Howard R. Hughes, and TWA has not taken the position and will reserve the question of whether the Hughes Tool Company can or cannot produce Mr. Howard R. Hughes, and we are not particularly concerned because that is why we used the witness subpoena in the first place, to be sure he would be there.

The Tool Company asserted a counterclaim, among others, for $45 million. Its counterclaim 3 purports to be on behalf of TWA and its 13,000 stockholders, and another 5,000 stockholders in Street names, so it purported to assert a cause of action for $45 million on behalf of TWA.

It also asserted a cause of action in its own right against TWA, among others, for $45 million.

[24920] I think it must be borne in mind, your Honor, that the Tool Company and these other defendants, including Holliday—who, by the way, is not a party, apparently, to any of these proceedings—it is he who is a defendant and he should be participating—I think it would be well to recall that these defendants controlled the operations of TWA in all respects, and they knew everything that happened and why it happened, who did it and how much it cost and what the results were.

When they see fit to represent to this Court, as they have in the counterclaim, that TWA was injured to the tune of $45 million, I am happy to report to this Court that their estimate, based on the hard work that we have done since this case was filed, involving the use of Coverdale & Colpitts as experts, leads us to believe that, without touching any tax benefits that they derived by reason of their violation of law—before reaching that—TWA's damages are $45 million-plus.

For Mr. Davis to stand here and with tongue in cheek say to this Court that the expenses of this litigation and of these depositions are so great—even, by the way, if they flew to [24921] California on TWA they would get 78 per cent of the profits of the flight—that the expenses are so great that they won't participate in discovery proceedings is obviously absurd.

I deny that Mr. Davis has any authority to state to your Honor definitively or otherwise what Hughes will or will not do on Monday morning. I don't think he can commit that man to his behavior at all.

He can say to you, if he is authorized to say it, that the Tool Company won't be there, but on behalf of TWA I say to your Honor that is completely immaterial.

I think this kind of strategy such as has been tried in the past, as I understand it what they are trying to do is to create some record so that a default in appearance Monday by Hughes is a default by the Hughes Tool Company, and therefore they would insist that TWA then make a motion under Rule 37(d), and it requires a motion, and we haven't made it and I am not sure we will ever make it, but it does require a motion, to ask your Honor to then enter a default judgment based on what? Based on their inability to produce him? I don't intend to [24922] proceed that way at all. I see no reason for changing the rules of practice at the behest of any individual.

We have, I submit to your Honor, TWA has, a right under your orders, under the processes of this court and the processes of the court in California, to the sworn evidence of this man.

Now, if there is any reason he cannot appear, let him say so. But we have a right to that evidence.

Who knows, if he is persuasive enough, he might persuade me that there is something in his derivative counterclaim. Up to date I haven't seen that to be true, but he might. And I have got a right to examine him.

In so far as the other counterclaims are concerned, certainly TWA has a right to defend itself against claims for millions of dollars by the Hughes Tool Company arising or said to arise out of the action in the counterclaims.

I think that the attempt to evade the question of the merits of this case by such procedural gimmicks as this is all too transparent. They cannot declare an anticipatory default. There [24923] is nothing in the rule that says that. If he wants to default, withdraw his answer and let's have

a default judgment. If he doesn't, let him default on Monday if he has an application to produce Hughes on Monday.

So far as TWA is concerned, the obligation on Monday is for Hughes to appear personally, and we will take whatever action is necessary to see that he does, if he doesn't appear.

This is, as TWA sees it, another stall or attempted stall. It is an attempt to bait us away from getting at the merits of the controversy by offering us some phony maneuver for a partial default judgment, unlimited damages. The damages I think we will collect in this case are $135 million. That is the amount that they alleged we were hurt, tripled, and we will prove it.

We will also establish our right to the divestiture that we seek in this complaint.

These sorts of maneuvers do not reach that point at all. They will try to foreclose us from the sort of record that I want to present to your Honor, whether it is on default or trial, so that you will conclude, as I have, that the only [24924] proper remedy for the violations of law here, in addition to damages, is a divestiture of this stock. That is the only cure for this situation.

This is an effort to lead us down a garden path to some very unsatisfactory results. I think we should go forward on Monday.

The Court: Mr. Davis, have you or Hughes Tool Company directed Mr. Howard Hughes not to appear on Monday?

Mr. Davis: No, your Honor, I am not aware of any direction, certainly none that was emanating from me.

The Court: Suppose Mr. Hughes shows up on Monday.

Mr. Davis: Well, I am perfectly prepared to stipulate that the place of the deposition be here rather than in California and to make this the place, and we will note the

default of his appearance. There is no question about that determination.

I do know that Mr. Hughes, by reason of the direction of the Special Master, has been informed of what I read to your Honor earlier.

Your Honor, before I proceed to further [24925] answer your question, may I correct Mr. Sonnett, which I am sure he has said inadvertently because the notice for the taking of deposition which we are talking about of September 6, 1962, reads—this was addressed to the Special Master and that is what was granted and affirmed by your Honor—

The Court: What date are you referring to?

Mr. Davis: The notice of motion of TWA dated September 6, 1962, which is the subject of this discussion, by Cahill, Gordon, Reindel & Ohl. Let me read it:

> "Please take notice that upon the pleadings here, and all prior proceedings herein, including the pretrial hearing held September 6, 1962, before the Hon. Charles M. Metzner, United States District Judge, the undersigned will move before the Hon. J. Lee Rankin, Special Master, on the 11th day of September 1962 at 10:00 A.M. or as soon thereafter as counsel can be heard,
>
> "(a) For an order that plaintiff Trans World Airlines, Inc. may commence the taking of the deposition of Howard R. Hughes at the [24926] United States Courthouse, Foley Square, New York, on September 24, 1962, and continue such deposition from day to day until completed,
>
> "(b) For an order directing that defendant Hughes Tool Company produce said Howard R. Hughes at the time and place aforesaid for the purpose of such deposition. . ."

Now, I do not understand Mr. Sonnett's statement that what we are talking about is what he has been describing.

Mr. Sonnett: Reread paragraph (a).

Mr. Davis: I understand that, and that was changed from New York to California, and that is when I took the trouble of going out because I thought you were then taking the position that a notice of subpoena could not be served in New York and you were refusing to serve it in New York.

The point I am making is that you did take the position that it was the responsibility of the Tool Company to produce Mr. Hughes, and the Tool Company has taken the position that it has taken.

I am perfectly prepared to have a proceeding, if it will help your record, Mr. Sonnett, on Monday, if that is the date that you want. We [24927] can do it in this courtroom, you can do it in my office, you can do it in Mr. Rankin's office, and there you can note the fact that the Tool Company is failing in refusing to produce Mr. Hughes, and then you can have your record and you can take your remedy on it.

I do not understand what remedy it is that the TWA is seeking when it has the opportunity to prove these damages that you claim you can establish against the Tool Company, and I don't understand the statement and what the purpose is of TWA saying that it does not want to proceed in that manner.

My purpose of course is to obtain something which will enable me to get a review on the law as to whether or not you are entitled to be here in the first place. And then I am prepared, if I am wrong in that regard, to pay the consequences to the extent to which you are able to prove damages.

Mr. Sonnett: May I briefly respond, your Honor, because I think—although again I have trouble understanding, Mr. Davis can talk so much and say so little—I think

that he said to your Honor that he accepted the subpoena which was issued out of the Los Angeles court for the production of [24928] Hughes as an individual. I think he has admitted that he filed papers with the marshal out there, saying he was authorized to accept the service of the subpoena on behalf of Howard R. Hughes as an individual. I think he admits that he made that representation to this Court when we were dealing with the forged authorization matter and in an effort to blunt it, and I don't know yet whether Mr. Hughes has seen fit to issue instructions to this board of directors of the tool company or whether he hasn't about this matter. There is no counsel here speaking for him, and I haven't any illusions personally that anything Mr. Davis says is going to produce Mr. Hughes anywhere at any time unless Mr. Hughes decides to comply with the process of the court, and he is under that process.

This is only an attempt to create another procedural diversion. If there is going to be a default on Monday, let there be a default, that is within their power, it is within Mr. Hughes' power—but I know of no procedure for anticipatory defaults—otherwise let him withdraw his answer and let's have a judgment on the complaint for the relief we seek.

[24929] The Court: Well, I understand one of the reasons we are having this conference is to discuss an anticipatory default so that people don't go to a great deal of trouble and effort running out to California and coming back the same day.

Mr. Sonnett: I have people out there who have been there for six or seven days, about six people in an office, ready to go.

The Court: And there are a lot of people who are not out there, and I have been given to understand that this conference was called for the purpose of discussing this anticipatory default and to notice Judge Hall that he should

discontinue any arrangement efforts he is making for this deposition to take place. It was done on the basis of Mr. Hughes not going to appear. Let us not have everybody running out there.

Now, Mr. Davis says that as far as the defendant Hughes Tool Company is concerned, they will admit today that Mr. Hughes will not appear on Monday and that as a result you may then take whatever steps you wish to pursuant to Rule 37.

I would also like Mr. Davis to state for the record that if by chance Mr. Hughes should appear [24930] at the courthouse on Monday, despite what has transpired here this afternoon, that that will be no defense to any proceeding taken by TWA.

Mr. Davis: I will so state, your Honor.

Mr. Sonnett: We are going to have people there in any event, your Honor, with respect to whatever you direct, and I mean that only in this sense, that I don't think Mr. Davis can call the turn on Mr. Hughes' movements any more than I can. There is process outstanding from that court, the courthouse is arranged, the amplifiers are in, the place is swept. We had a report this afternoon there are people out there with files all ready to go.

I think he either will show up or not show up. It is that simple.

The Court: Mr. Davis is telling you he is not going to show up, and Mr. Davis has been the conduit through whom the orders of the Court have been transported to Mr. Hughes, and one of those orders was that if Mr. Hughes did not show up the Court would entertain a motion for a default judgment and an assessment of damages.

If Mr. Davis now tells you that Mr. Hughes is not going to show up, and even if he is going to [24931] show up he is not going to use it as a defense to any motion in this court pursuant to Rule 37, I would think that takes care of that phase of the case.

I am bothered about the counterclaims.

Mr. Bromley: So am I.

The Court: I think the plaintiff, in so far as his complaint is concerned, is amply protected by the record made here this afternoon, and you may then move for your default judgment.

But the counterclaim problem bothers me, and I do not see, Mr. Davis, how you can do anything else but take a dismissal with prejudice on your counterclaims, otherwise the additional defendants are perfectly justified in going out to California and noting the default of Mr. Hughes and coming back and moving for a dismissal with prejudice.

Mr. Davis: Well, as your Honor undoubtedly recalls, there is already a motion pending by these additional defendants to dismiss these counterclaims with prejudice returnable February 18th.

The Court: That is on a different basis.

[24932] Mr. Davis: I understand that.

The Court: That is just another reason why—

Mr. Davis: I am perfectly prepared to state, if that will facilitate the procedural matters, that the Tool Company, in so far as these counterclaims are concerned, does not intend to pursue litigating those counterclaims in this court until after there has been a determination by the CAB, and if that has been—

The Court: You don't have any control of that. Once you instituted your action—and you are in the position of a plaintiff in that regard—the defendants acquired priority of deposition. You cannot come in now and say, "I am not going to push this; I am going to sit back and wait a while, and you, Mr. Defendant, have to wait for me."

Once you initiated that proceeding by way of counterclaim and the defendants have their right to proceed, you cannot tell them to stop.

Mr. Davis: Your Honor, I can only take a position I do not consent to any order that the Court may issue at

the instance of these additional [24933] defendants for whatever reason they advance.

I believe that I have called to your Honor's attention all that occurs to me at the moment which should be called to your attention, and you can be certain that I haven't had very much time to prepare on this, although in my conversation with Mr. Rankin yesterday it was not clear to me just exactly what would be involved here, except that the question of whether or not he were to go to Los Angeles was involved, and there is no question he called to my attention—

The Court: He may want to take a flight out there to note a default. I don't know.

Mr. Davis: I would be perfectly happy to do the same thing with respect to the additional defendants if your Honor rules that under the prior orders of the Court, notwithstanding my different construction of them, they are entitled independently of TWA to commence taking depositions on February 11th.

All I can do is say those will be the orders of the Court; and if they, like, Mr. Sonnett, would like to have a notation on the record of the position of the Tool Company and the failure of Mr. [24934] Hughes to appear, they can have that also, and then they can make whatever application they want which will produce whatever order the Court will grant them.

The Court: Judge Bromley, Mr. Davis has now said—and I call upon you simply because you appear first in the list of additional defendants as I recall them; I meant no offense to your colleagues—

Mr. Bromley: You did not do it on account of my age either.

The Court: Oh, never. Some day the same thing may happen to me.

You have heard Mr. Davis' suggestion, and if I can reiterate it, there is no necessity of your going out to

Los Angeles to note Mr. Hughes' default—or, rather, to take Mr. Hughes deposition because he is not going to show up; that if he does show up and you are not there, this is no defense by them to any motion by you for a dismissal with prejudice of the counterclaims.

Since essentially this is a Hughes Tool Company matter, a dismissal with prejudice of the counterclaims, I would think, sufficiently protects [24935] the additional defendants, and if I am wrong on that I would like to know.

Mr. Bromley: First I would like to be made clear that this failure to appear, this declaration of refusal to appear, is a refusal to appear pursuant to the notices of the additional defendants of on or about February 13, 1962, to examine the Toolco by Hughes, and is a failure to appear with respect to the subsequent orders issued by your Honor with respect to those notices.

He has not made that clear.

The Court: Do you understand that, Mr. Davis?

Mr. Davis: Your Honor, I will answer it very briefly. It is a position based upon all proceedings to date. That includes all the notices that were served from time to time, all the determinations and decisions by the Court, and all the positions that the Tool Company has taken, so that it is based upon everything that has occurred to date, including the positions I have taken today.

The Court: Well, now they get a little complicated, because Judge Bromley says the prior proceedings of the Court and the notices are one [24936] way and you have argued the opposite way today.

Mr. Bromley: That's right.

The Court: So we are not clear.

Mr. Davis: All I meant by that, your Honor, was that up to this noting of default they want to make an application to your Honor as to whether or not they are entitled to whatever relief they seek, and I suppose at that time

I will make perhaps no better an argument than I made today with respect to what their rights were under whatever has occurred, and if your Honor rules at that time—unless you want to make a ruling now, then that will be the ruling now and whatever record I have will be whatever has been decided.

The Court: Well, I purposely put over the motion, your motion, as served on Wednesday, returnable today, to stay all proceedings on the counterclaims pending a determination by the CAB on the ground that the issue of appearance or non-appearance was involved in your main motion to dismiss the claims, and that if the Court of Appeals were to grant a stay of my order, that it would be stayed for all purposes.

And I think I stated on the record, did [24937] I not, Mr. Hupper, that this is an extension of the stay to the claim extended to the additional defendants?

Mr. Hupper: Your Honor, I was so rash as to raise the subject and you hit me right over the head.

The Court: Well, you are an advocate and you are entitled to that.

Mr. Davis has not seen fit to apply for a stay and therefore the proceedings are to go forward.

Now Mr. Davis says, "Well, there is no point of going out to California on the claim because Mr. Hughes is not going to show up."

We might as well then consider the motion at this time for a stay of the proceedings on the counterclaims and deny that stay, and from then on we come to the question of what is the state of the record, come Monday, if Mr. Hughes does not appear; and, as I understand it, even if he does appear, it will make no difference.

Mr. Davis: That's correct, your Honor.

The Court: Because if he appears, as [24938] far as the Hughes Tool Company is concerned, he has not appeared

and they will not use his appearance as any defense to a motion made by the additional defendants for a judgment of dismissal with prejudice.

I want to point out to you, Mr. Davis, that Mr. Hughes' appearance on February 11th was not solely in conjunction with the deposition to be conducted by TWA but was also in conjunction with the counterclaims which you have asserted against TWA and the additional defendants; that notices to take that deposition were properly served; that the Court fixed an order of priority of deposition and indicated when the deposition of Mr. Hughes would go forward in so far as the additional defendants were concerned, and that was reiterated in the pretrial order of this Court on January 10th. So that if Mr. Hughes is not appearing—and even if he does appear, as far as we are concerned in this litigation, he has not appeared, on your concession—then the appearance is in default and in violation of the notices and the prior orders of this Court.

Judge Bromley, you may proceed on February 11, if you wish to wait until that time— [24939] and it is too late for you to make the application tonight—for a judgment of dismissal of the counterclaims with prejudice.

Is there anything else left on that?

Mr. Bromley: Only one more thing before I forget it.

Your Honor's stay of the tax documents having expired an hour and 25 minutes ago—

The Court: That is a third ground.

Mr. Bromley: A third ground—I ask for their production to the special master, who is here in the courtroom.

Where are the documents, Mr. Davis?

The Court: You might as well make your record, Mr. Davis.

Mr. Davis: I restate my position, Mr. Bromley.

The Court: You are not producing the tax documents?

Mr. Davis: That is correct, your Honor.

The Court: We can consider those in the same category or you embrace them within your refusal of not going forward with any further deposition discovery proceedings? [24940] Mr. Davis: That is correct, your Honor.

The Court: So there is outstanding therefore the default of Mr. Hughes on Monday, the failure to produce the tax documents, and the failure to produce the documents which you claim are governed by the attorney-client privilege and as to which the Court says the privilege has been waived.

I think on the latter you have a motion returnable February 18th.

Mr. Bromley: Yes, your Honor, which was intended to embrace all of these defaults which I thought he would make.

The Court: Do you wish to adjourn the motion now returnable on February 18th, or some more convenient time, at which time all of these things could be brought up? In other words, Judge Bromley, this is being done piecemeal. The record is now set for you to take whatever action you wish to take on the counterclaims and for Mr. Sonnett to take whatever action he wishes to take on the claims based on the default of Mr. Hughes on Monday.

Secondly, you have the failure to pro- [24941] duce the tax documents, which is an individual and separate ground for proceeding; and you have the failure to produce the attorney-client documents, which are a separate and individual ground for proceeding.

However, only one of those has been noticed to the Court, and that was your notice for February 18th. My only question is shall we now on the record adjourn that motion without date so that all of your proceedings can come on at one time?

Mr. Bromley: Yes, I am ready now or at any time you say. I am willing to put it over as you suggest.

The Court: I will leave it up to you to renotice the motion.

Mr. Bromley: That's right. I will accept that responsibility and do so.

Mr. Davis: Your Honor, will the special master undertake to advise the court in California, Judge Hall, of the result of today's proceedings?

The Court: Will you do that, Mr. Rankin?

Mr. Rankin: Yes, your Honor.

Mr. Sonnett: On that point, your [24942] Honor, is the record clear, as I think it is, but I want to be doubly sure, that there is no stay with respect to TWA's deposition of Mr. Hughes on Monday in California?

The Court: No. I am afraid, Mr. Sonnett, that we have agreed here—at least I think we have—that there is no point in your going out to California on Monday because Mr. Hughes is not going to appear, and that Toolco says that since he is not going to appear, and if he does appear in order to protect what he may feel are individual problems regarding failure to appear, you are still free to make application under Rule 37 for a dismissal or for a judgment on your complaint.

Mr. Sonnett: I am sure that binds Toolco but it doesn't bind Mr. Hughes.

The Court: Suppose that is so. That is the only part you have in the lawsuit right now.

Mr. Sonnett: So that therefore your Honor's direction today is without prejudice to whatever rights TWA may have to enforce the subpoena in California directed to Mr. Hughes.

The Court: What do you mean by that?

Mr. Sonnett: Well, we may see fit to [24943] seek some way of attempting to induce Mr. Hughes to appear and testify.

The Court: I see no reason for that at the present time.

Mr. Sonnett: At the present time I can't see anything very clearly except to be sure I can't see Monday very clearly.

The Court: Well, if you feel that as far as you are concerned, TWA, I will continue the stay of the deposition for that purpose only. If you want to have it lifted at some time in the future you may come in and apply to have it lifted solely for that purpose and none other. In other words, the understanding of the Court is that you have now an anticipatory default for failure to appear which will ripen at 10 o'clock Monday, February 11th, on consent of Hughes Tool Company, the only defendant here with the responsibility, I assume, to answer in mondy [*sic*] damages to your claim. And then you are free to move for a dismissal—I mean for a judgment on your claim.

Mr. Sonnett: If Mr. Davis accepts what your Honor has just said, I have no problem about Monday. I wish he would say yes or no to that.

[24944] The Court: Do you understand what I just said, Mr. Davis?

Mr. Davis: I understood what you said, your Honor, a long time ago, and I thought I made myself quite clear on the record, and I don't understand how Mr. Sonnett wants to take testimony—

The Court: Now, Mr. Davis, we have a simple question, yes or no?

Mr. Davis: I understand everything you said, your Honor.

The Court: And the answer is yes?

Mr. Davis: That's correct, your Honor.

Mr. Sonnett: Thank you.

The Court: All right.

(Adjourned sine die.)

Opinion and Orders, May 3, 1963

[5161]

[CAPTION] 61 Civ. 2324

[5162] METZNER, D. J.:

The plaintiff Trans World Airlines, Inc. (TWA) has moved for an order pursuant to rules 37(b)(2)(iii), 37(d) and 55(b)(2) of the Federal Rules of Civil Procedure directing the entry of a judgment by default against the defendant Hughes Tool Company (Toolco). It requests that a hearing be held to determine the amount of damages to be paid by Toolco for the injuries alleged in the complaint, and that Toolco divest itself of all of [5163] its right, title and interest in the stock of TWA. The motion also seeks leave to increase the *ad damnum* clause following paragraph 70 of the complaint, from $105,000,000 to $135,000,000. It further seeks a dismissal of the counterclaims with prejudice. The motion further requests that Toolco, its officers and employees, or anyone acting in concert with them, be enjoined from instituting any action based upon the counterclaims set forth in the answer of Toolco and from instituting any proceeding before an administrative agency of the United States in which TWA is a party and which is based upon the allegations of the counterclaims. Finally, it is requested that the claims asserted by TWA against the defendant Holliday be severed from these proceedings.

Toolco owns 78% of the stock of TWA and Howard R. Hughes owns all of the stock of Toolco. It is clear that during all of the times covered by the complaint the management of TWA was controlled by Hughes personally.

The deposition of Hughes was originally scheduled for September 24th, 1962 and was adjourned by the court to October 29th, 1962. On October 25th [5164] the Special Master

adjourned the deposition of Hughes to February 11th, 1963. On December 28th, 1962 the Special Master stated that when this adjournment was granted there was no doubt that it was the intention and expectation that the deposition would start on the adjourned date and proceed until it was concluded according to law.

In the pretrial order of January 10th, 1963 the court affirmed this ruling of the Special Master, and stated that the date of February 11th, 1963 would be adhered to in the absence of extraordinary circumstances. The order of January 10th also directed Toolco to produce certain documents as to which it claimed an attorney-client privilege. The order pointed out that Toolco's opposition to producing such documents was in fact a reargument of the order of this court dated July 24th, 1962 which denied the claim of privilege.

The order of January 10th also denied Toolco's application to proceed at that time with the examination of two witnesses on the ground that such deposition would interfere with the taking of the Hughes deposition scheduled for February 11th.

[5165] On January 15th counsel for Toolco moved for an order that the Hughes deposition be taken on written interrogatories, or, in the alternative, that the motion to dismiss the complaint, pending since August 9th, 1961, be brought on for hearing. On January 16th Toolco's counsel was informed that he would be given until February 1st to submit all papers in support of his motion to dismiss. On January 19th Toolco's motion to take Hughes' deposition in writing was denied. The court, however, allowed counsel for Toolco time to indicate whether he desired the place of deposition to be changed for the convenience of Hughes. No such request was ever made.

On January 23rd the Court of Appeals denied Toolco's application for a stay of the orders of January 10th and 19th.

On February 1st, on Toolco's appeal from an order of the Special Master, the court affirmed that order, and directed that Toolco produce certain tax documents to TWA on a daily basis up to February 11th.

On February 6th a hearing was held on Toolco's motion to dismiss the complaint. The motion was denied [5166] from the bench with an indication that the formal opinion would be filed the following day. The denial of the motion embraced a finding that the court had jurisdiction of the claims. Toolco was granted a stay of deposition-discovery proceedings until 5 p.m. on February 8th, to afford it an opportunity to apply to the Court of Appeals for a further stay pending an application for a writ of mandamus.

The formal opinion of February 7th, denying Toolco's motion to dismiss the complaint, pointed out that the grounds urged for a dismissal existed and were adverted to in the original notice of motion filed on August 9th, 1961, and served several weeks prior to the assignment of this case for all purposes, pursuant to rule 2. The court indicated that counsel for Toolco could just as well have argued the motion at the inception of the litigation, instead of waiting until the taking of the deposition of Hughes was imminent.

A pretrial conference was held on Friday, February 8th, at 5 p.m., on information that counsel for Toolco was not going to proceed with the deposition [5167] proceedings of Hughes on the following Monday. Toolco did not apply to the Court of Appeals for a stay pending an application for a writ of mandamus, but, rather, submitted a "Notice of Position" to the court at the time of the hearing. In essence, this document stated that because of the enormous expenses that would be incurred in further pretrial and trial proceedings, which in Toolco's belief would exceed the amount of damages provable by TWA under the complaint, Toolco decided to rest on the merits of its position,

so that the Court of Appeals would have an opportunity to rule upon the propriety of the denial of the motion to dismiss the complaint.

At the hearing counsel for Toolco stated that he had advised his client of the sanctions available to TWA under rule 37, and that by insisting upon a right to obtain a review of the legal questions involved in the proceedings to date Toolco understood that it might be deprived of further defending on the merits. Counsel referred to this as a "business decision."

Counsel for Toolco specifically stated that Hughes would not appear for deposition on February 11th [5168] and that if it were necessary to clarify the record everyone could gather on the following Monday (February 11th) to

> "note the fact that the Tool Company is failing in (sic - and?) [sic] refusing to produce Mr. Hughes, and then you can have your record and you can take your remedy on it."

Counsel also stated that he did not intend to further litigate the counterclaims until after a determination of a complaint filed by Toolco with the Civil Aeronautics Board on February 6th which includes some of the allegations of the counterclaims.

Embraced within the refusal to proceed with the deposition of Hughes is the refusal to obey the orders of the court directing Toolco to produce the documents referred to above.

On the basis of this record TWA made the motion now before the court. It is clear that the deposition of Hughes is essential for the proper presentation of TWA's case. It is also clear that the failure of Hughes to appear on February 11th for his deposition was the result of a clear and studied determination by Toolco after all efforts to postpone the appearance of Hughes had failed. The default

was [5169] deliberate and willful and justifies the court in entering a default judgment as provided in rule 37(b)(2)(iii) and 37(d). A judgment by default shall be entered in favor of TWA against Toolco, and the counterclaims asserted by Toolco against TWA shall be dismissed with prejudice.

That branch of the motion seeking to increase the *ad damnum* clause from $105,000,000 to $135,000,000 is granted. This is not a case where a party has defaulted in appearance. Here issue was joined and adversary proceedings continued in the pretrial stages of this litigation. The damages originally asserted were unliquidated and TWA is entitled to recover for whatever damage it can show it suffered. Furthermore, Toolco will be represented at the hearings necessary to assess damages under rule 55(b)(2). Rule 54(c); *Peitzman* v. *City of Illmo*, 141 F.2d 956 (8th Cir. 1944); *cert. denied*, 323 U.S. 718 (1944; *cf. Riggs, Ferris & Geer* v. *Lillibridge*, Docket No. 27814, 2d Cir., April 10, 1963.

Before entering the final judgment a hearing must be held to determine the amount of [5170] damages to be awarded TWA since the damages are unliquidated. Therefore, pursuant to rule 55(b)(2), the question of the amount of the damages to be paid by Toolco to TWA is referred to J. Lee Rankin, the Special Master heretofore designated by the court, who has presided over the deposition-discovery procedings for the past year.

TWA has also requested that Toolco divest itself of its 78% stock interest in TWA. The propriety of granting this prayer for relief will be determined by the court.

The determination of the application by TWA for an injunction will be held in abeyance pending the entry of the final judgment.

The application to sever the action against Holliday has been withdrawn on his election to be individually bound

by the defaults of Toolco. Consequently, the application for a default judgment is deemed to include a request for similar relief against this defendant, and the disposition of this motion as to Toolco is also dispositive as to Holliday.

[5171] I am of the opinion that this order involves a controlling question of law (see *Pan American Airways, Inc.* v. *United States*, 371 U.S. 296 (1963)) as to which there is a substantial ground for difference of opinion. Enormous expense has already been incurred in this litigation, and the hearings before the Special Master on the question of damages, with a potential recovery of $135,000,000 on the first two claims and $10,000,000 on the third claim, may well be prolonged. An immediate appeal from this order is justified, since it may materially advance the ultimate termination of this litigation.

So Ordered.

Dated: New York, New York
May 3, 1963

Charles M. Metzner /s
U. S. D. J.

[The above also appears at 32 F.R.D. 604.]

[4969]

Trans World Airlines v. *Hughes*, *61 Civ. 2324*

For all of the reasons stated in the opinion and order entered on the companion motion by Trans World Airlines, Inc. for a default judgment and dismissal of the counterclaims with prejudice, this motion by the additional defendants is granted. The counterclaims alleged against these additional defendants are dismissed with prejudice and final judgment is directed to be entered accordingly, pursuant to F.R.C.P. 54(b) on the ground that there is no just reason for delay.

So Ordered.

Dated: New York, New York
May 3, 1963

Charles M. Metzner /s
U. S. D. J.

Opinion Re Sixth Counterclaim

[5172]

[CAPTION] 61 Civ. 2324

METZNER, D. J.:

The sixth counterclaim in the answer of defendant Toolco seeks to recover $72,089.55 from the plaintiff TWA. It claims that TWA failed to pay this amount which represents a portion of the interest [5173] on TWA's interim notes of $100 million for the five-day period between June 8, 1961 and June 12, 1961, inclusive. TWA denies the asserted liability.

Both parties have moved for summary judgment and refer to the terms of the agreement between them dated December 1, 1960, known as the "Hughes Financing and Subordination Agreement." This agreement made provision for the issuance by TWA to Toolco of the interim notes and for the method of repayment. In addition, plaintiff has moved to dismiss this counterclaim on the grounds that it fails to state a claim and that the court does not have jurisdiction of the subject matter.

It is clear from the face of the counterclaim that it states a claim and this branch of the motion accordingly is denied.

While it is true that diversity jurisdiction does not exist as to this counterclaim, it is clearly a compulsory counterclaim since "it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . ." Fed. R. Civ. P. 13(a). Such a counterclaim is ancillary to the main [5174] claim, and no independent basis of jurisdiction is required. See 3 *Moore, Federal Practice* ¶ 13.15[1] (2d ed. 1948) and cases cited. This branch of the motion seeking a dismissal on the ground

that the court lacks jurisdiction of the subject matter is denied.

The agreement of December 1, 1960 was a necessary part of the overall financing of the Jet Flight Equipment Program, which included large borrowings from banks and insurance companies. It required subordination of prior indebtedness of TWA to Toolco in the amount of $100 million, and was to be achieved by TWA issuing these interim subordinated notes in payment *pro tanto* of the amounts owing by TWA to Toolco in December 1960. Thereafter TWA was obligated to offer to its stockholders the right to purchase, at least at par, $100 million worth of subordinated debentures. The parties agreed that the interest on both the interim notes and the debentures was to be 6½ per cent.

Within three business days after the close of the subscription offer to the stockholders, Toolco [5175] was obligated to purchase the "principal amount" of the unsubscribed portion of the debentures at the subscription price. The agreement then provided that

> "TWA shall . . . refund the Interim Subordinated Notes . . . upon the purchase by Hughes of [the] Subordinated Debentures . . . and Hughes shall accept such Subordinated Debentures in any such refunding of the Interim Subordinated Notes up to the aggregate principal amount of Subordinated Debentures which Hughes is so obligated to purchase." [The reference to Hughes in the foregoing quote means Toolco.]

The refunding was to be completed by TWA paying to Toolco the cash it received from the subscriptions plus accrued and unpaid interest on the interim notes to the date of refunding.

As of May 31, 1961 all interest due on the interim notes had been paid. The debentures had been offered at par, and were dated June 8, 1961, the close of the subscription period. Three business days later, on June 13, 1961, TWA delivered to Toolco $19,037,900 in cash which had been received from the subscription offer and unsubscribed debentures in the principal amount of $80,962,100. This totaled $100 million, the amount of the interim notes. TWA also paid Toolco [5176] interest on the $100 million to June 8th plus interest on the $19,037,900 through June 12th. It did not pay interest from June 8th through June 12th on the $80,962,100 on the basis that it was substituting debentures for interim notes in the same amount with the same interest rate running from June 8th.

Toolco claims that its obligation under the agreement was to accept cash plus the "principal amount" of the debentures in payment of the interim notes on the refunding date, and that it is entitled to interest on the total of the outstanding notes to that date. It argues that even though interest was running on the debentures from five days before the refunding date, and results in double interest on the same amount for the period, such payment is called for by the contract. Furthermore, it points to the fact that the obligation to pay interest on the notes was unqualified, while the debentures provided for payment of interest only if earned, albeit payment was cumulative. [5177] It is true that the draftsmen of the agreement provided that a few days elapse between the closing date of the subscriptions and the date for refunding. They could easily have covered the problem by using such normal words as "with accrued interest", or something to that effect. However, it is understandable that such oversight could occur in a complicated financial arrangement, of which this agreement was an integral part and which necessitated thick booklets of provisos.

I find, based on the overall arrangements between the parties, that it was their intention to substitute the debentures for the interim notes and that payment of double interest for the five days was not the intendment of the parties. The motion for summary judgment by the plaintiff is granted. The motion for summary judgment by the defendant is denied. So ordered.

Dated: New York, N. Y.
May 28, 1963

/s/ CHARLES M. METZNER,
U. S. D. J.

Judgment Re TWA

[5180]

[CAPTION] 61 Civ. 2324

JUDGMENT

This action having come on further to be heard before this Court on February 21, 1963, on the motion of plaintiff Trans World Airlines, Inc., *inter alia*, for an order dismissing as against plaintiff, with prejudice, each and every counterclaim asserted in the answer and counterclaims of defendant Hughes Tool Company served and filed February 13, 1962, by reason of Hughes Tool Company's wilful and deliberate disobedience of and failure and refusal to comply with the orders of this Court of January 10, 1963, January 19, 1963, and February 1, 1963, and the Court having granted plaintiff's motion for summary judgment on the Sixth Counterclaim by order dated May 28, 1963, and after hearing counsel, and after due deliberation thereon, the Court on May 3, 1963, having filed a decision and order granting said motion, and it being expressly determined that there is no just reason for delay and expressly directed that judgment be entered as herein provided, it is

[5181] ORDERED, ADJUDGED AND DECREED that each and every counterclaim asserted in the answer and counterclaims of the defendant Hughes Tool Company except the Sixth Counterclaim is hereby dismissed as against plaintiff, with prejudice.

Dated May 28th, 1963.

/s/ CHARLES M. METZNER,
U. S. D. J.

Judgment entered this 28th day of May, 1963.

/s/ JAMES E. VALECHE,
Clerk.

Judgment Re Additional Defendants

[5184]

[CAPTION] 61 Civ. 2324

JUDGMENT

This action having come on further to be heard before this Court on February 21, 1963, on the motion of the additional defendants on counterclaims, The Equitable Life Assurance Society of the United States, Metropolitan Life Insurance Company, Irving Trust Company, Dillon, Read & Co. Inc., Ben-Fleming Sessel, James F. Oates, Jr., Harry C. Hagerty and Charles C. Tillinghast, Jr., pursuant to Rules 37(b)(2), 37(d), 41(b) and 41(c) for a final judgment dismissing with prejudice as to said additional defendants and each of them this action and each and all of the counterclaims asserted against them herein by defendant Hughes Tool Company by reason of Hughes Tool Company's willful and deliberate disobedience of and failure and refusal to comply with the orders of this Court of January 10, 1963, January [5185] 19, 1963, and February 1, 1963, and awarding to said additional defendants their costs and disbursements in the action and for a further order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure expressly determining that there is no just reason for delay in the entry of a final judgment with respect to the counterclaims, and after hearing counsel, and after due deliberation thereon, the Court on May 3, 1963, having filed a memorandum decision and order granting said motion, and expressly determining that there is no just reason for delay and directing the entry of judgment in accordance with said motion, it is

ADJUDGED that judgment is hereby directed in favor of the additional defendants on counterclaims, The Equitable Life Assurance Society of the United States, Metropolitan

Life Insurance Company, Irving Trust Company, Dillon, Read & Co. Inc., Ben-Fleming Sessel, James F. Oates, Jr., Harry C. Hagerty and Charles C. Tillinghast, Jr., dismissing with prejudice this action and each of the counterclaims herein as to said additional defendants, and each of them, with costs and disbursements in favor of said additional defendants and against Hughes Tool Company, to be taxed by the Clerk of this Court, and that said additional defendants have execution therefor.

Dated May 28th, 1963.

/s/ CHARLES M. METZNER,
U. S. D. J.

Judgment entered this 28th day of May, 1963.

/s/ JAMES E. VALECHE,
Clerk.

Affidavit of Carl S. Rowe

[25533]

[CAPTION] Civil Action No. 61-2324

State of New York }
County of New York } ss.:

CARL S. ROWE, being duly sworn, deposes and says:

I am an attorney and a member of the firm of Chadbourne, Parke, Whiteside & Wolff, general counsel to Trans World Airlines, Inc. ("TWA") and I make this affidavit in support of TWA's motion to dismiss, or, in the alternative, for summary judgment in its favor as to Counterclaim 6 set forth in the so-called Answer and Counterclaims of defendant Hughes Tool Company ("Toolco"). I am fully familiar with not only the pleadings and the prior proceedings had herein, but also with the instruments referred to herein and the circumstances surrounding financial transactions in connection with which said instruments were executed and delivered.

By its Counterclaim 6, Toolco claims that TWA owes it $72,089.55 as interest on a portion of the principal amount of an Interim Note which was refunded on [25534] June 13, 1961 in part by the payment to Toolco of cash and in part by the issuance to Toolco of debentures bearing the same interest rate (6½%) as the Interim Note. The fact of the matter is that all interest due on the note has been fully paid. If Toolco were to recover this $72,089.55 which represents interest for the period June 8 through June 12, 1961 on the portion of the debt refunded by debentures, Toolco would be receiving *double interest* for this same period on the same indebtedness. This readily appears from a consideration of the transaction referred to in the Sixth Counterclaim, the undisputed facts as to which are as follows:

Affidavit of Carl S. Rowe

1. TWA executed and delivered an Agreement dated as of December 1, 1960 (the Hughes Financing and Subordination Agreement) between TWA, Toolco, and certain financial institutions, a copy of which is attached hereto as Exhibit A. This agreement provided, among other things, for the issuance by TWA to Toolco of $100,000,000 principal amount of Interim Subordinated Notes in payment *pro tanto* of a like amount owing by TWA to Toolco (Section 1.1 of Exhibit A). On December 30, 1960, pursuant to the Hughes Financing and Subordination Agreement, TWA issued to Toolco its Interim Subordinated Note (the Interim Note here involved) in the principal amount of $100,000,000 bearing interest at the rate of 6½% per annum.

2. The Hughes Financing and Subordination Agreement also provided that TWA would make a subscription offer to its stockholders, of the right to subscribe [25535] ratably for an aggregate of not less than $100,000,000 principal amount of subordinated debentures of TWA. Such debentures could be convertible into Common Stock of TWA or have attached thereto warrants to purchase Common Stock of TWA, as determined by TWA. The subscription price was required to be not less than 100% of the principal amount of such debentures. (Section 1.2 of Exhibit A).

3. Under the Hughes Financing and Subordination Agreement, Toolco was obligated to purchase from TWA, not later than three business days after the expiration of the subscription offer, "at a price not less than the subscription price specified in the Subscription Offer" such number of debentures as would, with debentures purchased by it and others pursuant to the subscription offer, equal at least $100,000,000 principal amount. (Section 1.3 of Exhibit A). Upon such purchase of debentures by Toolco TWA was required by the Hughes Financing and Subordination Agreement to refund the $100,000,000 Interim

Note and in such refunding Toolco was required to accept subordinated debentures and TWA was required to accept, in payment for such debentures, the Interim Notes at the principal amount thereof, with payment of accrued and unpaid interest in cash, if otherwise permitted. (Section 1.4 of Exhibit A). It was the purpose and intent of this agreement that the indebtedness represented by the Interim Note would merely be replaced by an equal principal amount of subordinated debentures to the extent the Interim Note was not paid in cash.

[25536] 4. In accordance with the Hughes Financing and Subordination Agreement, TWA offered to its stockholders $111,235,900 aggregate principal amount of 6½% Subordinated Income Debentures due June 1, 1978 (the Debentures), with attached warrants to purchase Common Stock of TWA. The Subscription Offer commenced on May 25, 1961 and expired on June 8, 1961. The Subscription Price for the Debentures with attached Warrants was 100% of the principal amount of the Debentures, payable in cash. The Debentures bore interest at the rate of 6½%, payable if earned, *from the expiration date of the Subscription Offer, June 8, 1961.* Holders of rights other than Toolco subscribed pursuant to the Subscription Offer for an aggregate of $19,037,900 principal amount of Debentures.

5. Upon expiration of the Subscription Offer, TWA notified Toolco of the results thereof and advised Toolco that, in accordance with the Hughes Financing and Subordination Agreement, Toolco was thereupon obligated to purchase an aggregate of $80,962,100 principal amount of Debentures. At the Closing held on June 13, 1961 (such date being three business days after June 8, 1961), Toolco purchased said aggregate principal amount of Debentures applying $80,962,100 principal amount of the Interim Note in payment of the purchase price therefor.

6. At the Closing TWA paid Toolco $19,037,900 in cash, being the amount paid by other purchasers of TWA Debentures subscribed for pursuant to the Subscription Offer. This amount in cash, together with the $80,962,100 [25537] principal amount of Debentures issued to Toolco at the Closing, totalled, $100,000,000 and constituted payment in full of the principal of the Interim Note.

7. Prior to the June 13, 1961 Closing, TWA had paid Toolco all interest on the Interim Note for the period up to and including May 31, 1961. At the Closing TWA paid Toolco interest on the Interim Note in the aggregate amount of $141,609.08, computed as follows: accrued interest in the amount of (a) $40,683.73 on the $19,037,900 principal amount of the Interim Note paid in cash, being interest on said principal amount for the period from June 1, 1961 to and including June 12, 1961, and (b) $100,925.35 on the $80,962,100 principal amount of the Interim Note refunded by the issuance of an equal principal amount of Debentures (bearing interest at the rate of 6½% per annum from June 8, 1961), being interest on said $80,962,100 principal amount for the period from June 1, 1961 to and including June 7, 1961. Toolco does not dispute that the foregoing interest payments were made to it by TWA.

8. Toolco, however, contends that it is entitled to an additional interest payment of $72,089.55, which is 6½% per annum on the $80,962,100 principal amount of the Interim Note for the period June 8 to June 12, 1961, inclusive. But, as stated above, Toolco merely replaced $80,962,100 of the Interim Note with $80,962,100 of Debentures—no new money was advanced by Toolco—and, since the Debentures earned the same interest as the Interim Note (6½%) *from June 8, 1961,* [25538] Toolco has thus received the full 6½% interest on the debt owed by TWA to Toolco. Indeed, the 6½% per annum interest on the $80,962,100 of Debentures held by Toolco was actually paid

to Toolco in full for the entire period from June 8, 1961 to December 1, 1961 on December 1, 1961.

9. In sum, the Interim Note in the principal amount of $100,000,000, evidencing the indebtedness of TWA to Toolco, was paid in cash to the extent of $19,037,900 and the balance of $80,962,100 was refunded by Debentures in the same principal amount. Interest on such $19,037,900 was paid to and including June 12, 1961 and interest on such $80,962,100 was paid for the period from June 1, 1961 to and including June 7, 1961 at the Closing on June 13, 1961 and for the period June 8, 1961 to December 1, 1961 on December 1, 1961. If TWA had paid Toolco interest on the $80,962,100 principal amount of the Interim Note for the period from June 8, 1961 to and including June 12, 1961 at the Closing and in addition interest for the same period on the Debentures, *which evidenced the same indebtedness*, on December 1, 1961, TWA would have paid Toolco interest on the same indebtedness twice for the same period. Such a double payment of interest would have permitted Toolco to obtain an advantage over other stockholders subscribing for Debentures who were obligated to make payment in full prior to the expiration of the Subscription Offer on June 8, 1961, and without receipt of double interest. It thus would have resulted in payment by Toolco for the Debentures at a [25539] price less than the price paid by other stockholders of TWA contrary to the provision of the Hughes Financing and Subordination Agreement specifically requiring that Toolco purchase such Debentures at "a price not less that the subscription price."

WHEREFORE, I respectfully request that TWA's motion for summary judgment dismissing the Sixth Counterclaim be granted.

/s/ CARL S. ROWE

[JURAT: Dated March 28, 1962]

[25540] Exhibit "A" to Rowe Affidavit.

Agreement

AMONG

TRANS WORLD AIRLINES, INC.

AND

HUGHES TOOL COMPANY

AND

IRVING TRUST COMPANY, as Bank Agent

AND

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES and METROPOLITAN LIFE INSURANCE COMPANY

AND

CHEMICAL BANK NEW YORK TRUST COMPANY,
as Trustee

under the Indenture of Mortgage dated as of December 1, 1960,
from Trans World Airlines, Inc.

HUGHES FINANCING AND SUBORDINATION AGREEMENT

Dated as of December 1, 1960

[25541] *Exhibit "A" to Rowe Affidavit.*

AGREEMENT dated as of December 1, 1960 among TRANS WORLD AIRLINES, INC., a Delaware corporation (hereinafter called *"TWA"*), party of the first part, HUGHES TOOL COMPANY, a Delaware corporation (hereinafter called *"Hughes"*), party of the second part, IRVING TRUST COMPANY, a New York trust company, as agent for the hereinbelow-mentioned Banks (hereinafter called the *"Bank Agent"*), party of the third part, THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a New York corporation (hereinafter called *"Equitable"*), and METROPOLITAN LIFE INSURANCE COMPANY, a New York corporation (hereinafter called *"Metropolitan"*), parties of the fourth part, and CHEMICAL BANK NEW YORK TRUST COMPANY, a New York trust company, as Trustee under the Indenture of Mortgage dated as of December 1, 1960, from TWA (hereinafter called the *"Trustee"*), party of the fifth part.

WITNESSETH:

WHEREAS, pursuant to a program (hereinafter called the *"Jet Flight Equipment Program"*) for the modernization of its aircraft fleet, (a) TWA has acquired and now owns 15 Boeing Model 707-131 aircraft and 12 Boeing Model 707-331 aircraft and certain spare jet engines, spare parts, equipment and provisioning (hereinafter called *"spares"*) required by TWA to operate such aircraft, (b) TWA has acquired by assignment from Hughes the right to acquire from the manufacturers, pursuant to contracts between the manufacturers and Hughes, 20 Convair Model 880 aircraft (one or more of which aircraft TWA has acquired) and certain spares required by TWA to operate such aircraft and the aircraft referred to in clause (a) of this recital, and (c) TWA has the right to acquire from the manufacturers, pursuant to contracts between the manufacturers and TWA, certain spares required by TWA to operate the aircraft referred to in clauses (a) and (b) of this recital; and

WHEREAS Hughes is the owner of not less than 5,221,301 shares of Common Stock, par value $5 per share, of TWA, comprising ap-

proximately 78% of the outstanding 6,674,155 shares of Common Stock of TWA; and

WHEREAS TWA has executed and delivered to the Trustee an Indenture of Mortgage dated as of December 1, 1960 (hereinafter called the *"Note Indenture"*), which provides for (a) the delivery of $72,200,000 principal amount of 6% Equipment Mortgage Serial Notes of TWA, maturing serially on December 31, 1961, and quarterly thereafter through December 31, 1964 (hereinafter called *"Serial Notes"*), and (b) the issuance of $92,800,000 principal amount of 6½% Equipment Mortgage Sinking Fund Notes of TWA, due December 31, 1972 (hereinafter called *"Sinking Fund Notes"*), all said Serial Notes and Sinking Fund Notes being hereinafter collectively called the *"Notes"*; and

WHEREAS, in order to finance part of the cost of the Jet Flight Equipment Program, TWA has entered into an agreement dated as of December 1, 1960 (hereinafter called the *"December 1960 Loan Agreement"*), with Irving Trust Company and the other Banks named therein (hereinafter collectively called the *"Banks"*) and the Bank Agent, pursuant to which the Banks have agreed to lend an aggregate of $72,200,000 to TWA, such loans to be evidenced by an equal aggregate principal amount of Serial Notes; and

WHEREAS, in order to finance part of the cost of the Jet Flight Equipment Program, TWA has entered into agreements dated as of December 1, 1960 (hereinafter called the *"Note Purchase Agreements"*), with Equitable and Metropolitan (hereinafter together called the *"Insurance Companies"*), pursuant to which the Insurance Companies have agreed to purchase from TWA an aggregate of $92,800,000 principal amount of Sinking Fund Notes; and

WHEREAS it is a condition precedent to the obligation of the Banks to advance any moneys to TWA pursuant to the December 1960 Loan Agreement, and it is a condition precedent to the obligations of the Insurance Companies to purchase any Sinking Fund Notes from TWA

pursuant to the Note Purchase Agreements, that this Agreement shall have been duly executed and delivered by the parties thereto; and

WHEREAS the Bank Agent has been duly authorized by the Banks to enter into this Agreement;

NOW, THEREFORE, in consideration of the premises, the parties hereto agree with each other as hereinbelow set forth:

ARTICLE ONE

Financing Provisions

§ 1.1. TWA shall issue to Hughes, and Hughes shall accept from TWA, on the First Closing Date (which term, as used herein, means the date designated pursuant to the December 1960 Loan Agreement as the date on which the Banks will make the first advance of moneys to TWA thereunder and the date specified in the Note Purchase Agreements as the date on which the Insurance Companies will make the first purchase of Sinking Fund Notes from TWA thereunder), $100,000,000 principal amount of subordinated promissory notes of TWA (hereinafter called *"Interim Subordinated Notes"*), in payment *pro tanto* of the amounts owing by TWA to Hughes on the First Closing Date (including TWA's obligation to deliver subordinated obligations to Hughes with respect to jet aircraft and spares acquired by TWA prior to the date hereof pursuant to the Jet Flight Equipment Program, but not the interest on such subordinated obligations). The Interim Subordinated Notes shall be dated the date of delivery thereof, shall bear interest at such rate (not exceeding 7% per annum) as shall be agreed upon between TWA and Hughes, which interest shall be payable monthly to the extent permitted by § 4.30C of the Note Indenture and as otherwise permitted by § 1.4 hereof, shall be stated to mature not earlier than June 30, 1973 (except as otherwise permitted by § 1.4 hereof), and shall contain the notation and statement required by clause (a) of the third sentence of § 2.8 hereof.

§ 1.2. TWA shall proceed as soon as practicable, and in any event not later than May 31, 1961, to make an offer (hereinafter called the *"Subscription Offer"*) to the holders of its Common Stock, pursuant to which it will grant to such stockholders the right to subscribe, ratably in proportion to the number of shares of Common Stock held by them on the record date fixed by TWA for the determination of stockholders entitled to receive the Subscription Offer, for an aggregate of not less than $100,000,000 principal amount of subordinated debentures of TWA (hereinafter called *"Subordinated Debentures"*) at a subscription price, payable in cash (except as otherwise permitted by § 1.4 hereof), of not less than 100% of the principal amount of such Subordinated Debentures. The Subordinated Debentures may be convertible into Common Stock of TWA, or may carry the right, by accompanying or attached warrants or otherwise, to purchase additional shares of Common Stock of TWA, at such price or prices and during such period or periods as TWA shall determine. The Subordinated Debentures shall bear interest at such rate (not exceeding 7% per annum) as shall be agreed upon between TWA and Hughes, which interest shall be payable only if earned, but shall be cumulative, shall be stated to mature not earlier than June 30, 1973, and shall contain provisions substantially identical with those contained in § 2.2 to § 2.6, inclusive, of this Agreement, specifically subordinating the Subordinated Debentures to the payment in full of the Notes and of all other Senior Indebtedness of TWA (as defined in § 2.1 hereof) to the extent provided in § 2.2 to § 2.6, inclusive, of this Agreement and a statement to the effect that each holder of Subordinated Debentures by his acceptance thereof agrees to be bound by all such subordination provisions.

§ 1.3. Hughes shall purchase from TWA, and TWA shall issue and sell to Hughes, not later than three business days after the expiration of the Subscription Offer (and not later in any event than June 30, 1961), at a price not less than the subscription price specified in the Subscription Offer, such principal amount of Subordinated Debentures as shall be equal to the excess, if any, of (a) $100,000,000, over (b) the aggregate principal amount of Subordinated

Debentures subscribed for pursuant to the Subscription Offer (including any Subordinated Debentures thus subscribed for by Hughes), *provided, however,* that the maximum aggregate principal amount of Subordinated Debentures which Hughes shall be required to purchase from TWA and TWA shall be required to issue and sell to Hughes, pursuant to the Subscription Offer and this § 1.3, shall not exceed $100,000,000, although Hughes shall be entitled at its option (without any consent or other action by the parties hereto, other than TWA) to purchase from TWA a greater principal amount of Subordinated Debentures.

§ 1.4. It is understood that TWA shall pay or refund the Interim Subordinated Notes issued by it to Hughes, pursuant to § 1.1 hereof, upon the purchase by Hughes of Subordinated Debentures, pursuant to § 1.3 hereof, and Hughes shall accept such Subordinated Debentures in any such refunding of the Interim Subordinated Notes up to the aggregate principal amount of Subordinated Debentures which Hughes is so obligated to purchase. Such refunding will be effected (a) by the application by TWA of moneys received from the sale of the Subordinated Debentures, pursuant to the Subscription Offer or to Hughes pursuant to § 1.3 hereof, to redeem and retire all the Interim Subordinated Notes at a redemption price in cash equal to the principal amount thereof plus all interest then accrued and unpaid thereon, or (b) by TWA accepting Interim Subordinated Notes, at the principal amount thereof, in payment for the Subordinated Debentures which Hughes has agreed to purchase pursuant to § 1.3 hereof, and by TWA paying the accrued and unpaid interest on such Interim Subordinated Notes, in cash, to the extent permitted by § 4.30C of the Note Indenture, or, to the extent that such cash payment is not so permitted, by Hughes accepting additional Subordinated Debentures, at the principal amount thereof, in satisfaction of such accrued and unpaid interest, or (c) by any combination of (a) and (b) agreed upon between TWA and Hughes, or (d) in such other manner as may be agreed upon between TWA and Hughes, with the written consent of the Bank Agent and the Insurance Companies. Concurrently with any such refunding of Interim Subordi-

nated Notes, TWA shall pay, to the same extent and in the same manner and subject to the same limitations as in the case of the accrued and unpaid interest on such Interim Subordinated Notes, the accrued and unpaid interest on the subordinated obligations referred to in, and refunded as permitted by, § 1.1 of this Agreement.

§ 1.5. Hughes hereby establishes a revolving credit (hereinafter called the *"Credit"*) in favor of TWA in the aggregate principal amount of $50,000,000, for the period commencing on the First Closing Date and ending on the last day of the month next following the month in which TWA shall take delivery of and pay for the last of the 20 Convair Model 880 aircraft (hereinafter called the *"Last Aircraft"*) which TWA has the right to acquire under the Jet Flight Equipment Program. The Credit shall expire and terminate on the last day of such period.

§ 1.6. As promptly as possible, but in no event more than 25 days, after the end of each month from December, 1960, to and including the month in which TWA shall take delivery of and pay for the Last Aircraft, TWA will furnish a copy of its balance sheet as of the last day of such month to each of the parties hereto. If the Net Working Capital of TWA, as shown by said balance sheet, shall be less than $10,000,000, TWA shall borrow from Hughes and Hughes shall lend to TWA, under the Credit, an amount equal to the deficiency (or the amount of the Credit then unused, if that be smaller), each loan so made to be evidenced by a subordinated note of TWA (hereinafter called an *"Interim Subordinated Obligation"*), dated the date the loan is made, maturing on the date the Credit expires, bearing interest at such rate (not exceeding 7% per annum), as shall be agreed upon by TWA and Hughes, which interest shall be payable only to the extent permitted by § 1.7 and § 1.8 hereof, and containing the notation and statement required by clause (a) of the third sentence of § 2.8 hereof; *provided, however,* that Hughes shall not be obligated to make any such loan under the Credit at any time when the aggregate principal amount of Interim Subordinated Obligations outstanding under the Credit

equals $50,000,000. Each such loan shall be made five business days after TWA furnishes said balance sheet to Hughes, or on such earlier date as may be agreed upon between Hughes and TWA. The term "Net Working Capital" as used in this Section and in § 1.7 hereof shall mean, at any date, the excess of the Current Assets over the Current Liabilities (both as defined in § 1.3 of the Note Indenture) of TWA at such date, *provided, however,* that in any computation of Net Working Capital for purposes of this Section and § 1.7 hereof, (i) the principal of the Interim Subordinated Notes and the Interim Subordinated Obligations shall be excluded from Current Liabilities, and (ii) the assets constituting the completely funded reserves referred to in § 5.3 of the Note Indenture shall be included in Current Assets.

§ 1.7. If any balance sheet furnished by TWA pursuant to § 1.6 hereof shall show that the Net Working Capital of TWA exceeded $10,000,000 on the date thereof, TWA shall, at the request of Hughes made within five business days after TWA shall have furnished said balance sheet to Hughes, apply all or any part of such excess, to the extent required, first to the payment of the accrued and unpaid interest on, and then to the payment of the principal of, any Interim Subordinated Obligations at the time outstanding under the Credit.

§ 1.8. On the day the Credit expires, TWA shall pay in cash, to the extent permitted by § 4.30C of the Note Indenture, the accrued and unpaid interest on any Interim Subordinated Obligations then outstanding under the Credit and TWA shall deliver to Hughes in exchange for said Interim Subordinated Obligations and in satisfaction of any accrued and unpaid interest thereon to the extent not permitted to be paid by § 4.30C of the Note Indenture, a new subordinated note (hereinafter called the *"Subordinated Obligation"*) for a principal amount equal to the aggregate principal amount of said Interim Subordinated Obligations and any such interest not paid in cash, dated the date of delivery, stated to mature not earlier than June 30, 1973, and bearing interest at such rate (not exceeding 7% per annum)

as shall be agreed upon between TWA and Hughes, which interest shall be payable only if earned, but shall be cumulative. The Subordinated Obligation shall contain the notation and statement required by clause (a) of the third sentence of § 2.8 hereof.

§ 1.9. As promptly as possible, but in no event more than 25 days, after the end of each month in which the Subordinated Obligation is outstanding, TWA will furnish a copy of its balance sheet as of the last day of such month to each of the parties hereto. If the Net Working Capital of TWA, as shown by said balance sheet, shall exceed $15,000,000, TWA shall, at the request of Hughes made within five business days after TWA shall have furnished said balance sheet to Hughes, apply all or any part of such excess, to the extent required, to the payment of the principal of the Subordinated Obligation; *provided, however*, that no such payment shall be made (a) unless and until all cumulative interest accrued on the Subordinated Debentures to the last interest payment date immediately preceding such payment shall have been earned and paid in full, or (b) if after giving effect, as if paid, to such payment a default would exist in the performance or observance of any covenant or agreement of TWA contained in the Note Indenture. The term "Net Working Capital" as used in this Section shall mean, at any date, the excess of the Current Assets over the Current Liabilities (both as defined in § 1.3 of the Note Indenture) of TWA at such date, *provided, however*, that in any computation of Net Working Capital for purposes of this Section, (i) the principal of the Interim Subordinated Notes shall be excluded from Current Liabilities, (ii) there shall be included in Current Liabilities only such portion, if any, of the principal of any other Subordinated Indebtedness (as defined in § 2.1 hereof) and of the accrued interest on any Subordinated Indebtedness as at the date of such computation (and before giving effect to such computation) TWA shall be obligated to pay to the holders thereof within one year after such date, and (iii) the assets constituting the completely funded reserves referred to in § 5.3 of the Note Indenture shall be included in or excluded from Current Assets as may be required by sound accounting practice.

[25549] *Exhibit "A" to Rowe Affidavit.*

ARTICLE TWO

Subordination Provisions

§ 2.1. For all purposes of this Article Two:

(a) *"Senior Indebtedness"* shall mean (except as otherwise provided in § 2.7 hereof) (i) the Notes, (ii) any other obligations of TWA for money borrowed (other than for money borrowed from Hughes) which shall not have been specifically subordinated to the prior payment of the Notes at the time such obligations shall be incurred by TWA in the instrument creating or evidencing the same, and (iii) any obligations issued in renewal, extension, refunding, amendment or modification of any of the Notes or such other obligations.

(b) *"Guaranteed Obligations"* shall mean (i) any indebtedness or other obligation of TWA, payment of the principal of, premium, if any, or interest on which shall have been guaranteed by Hughes subsequent to the date of this Agreement, and (ii) any other obligation of TWA, the performance of which shall have been guaranteed by Hughes subsequent to the date of this Agreement.

(c) *"Subordinated Indebtedness"* shall mean all indebtedness which is not Senior Indebtedness and shall include (i) the Interim Subordinated Notes, (ii) the Subordinated Debentures, (iii) the Interim Subordinated Obligations, (iv) the Subordinated Obligation, (v) any indebtedness of TWA to Hughes arising by reason of money borrowed by TWA from Hughes or advances made by Hughes to or for account of TWA, (vi) any indebtedness of TWA to Hughes arising by reason of any payments made by Hughes under any guaranty by Hughes of any Guaranteed Obligations, and all rights and claims of Hughes against TWA so arising, and (vii) any obligations issued in renewal, extension, refunding, amending or modification of any of the foregoing. Subordinated Indebtedness may (but need not) be convertible into stock of TWA and may (but need not) carry the right, by accompanying or attached warrants or otherwise, to purchase such stock.

(d) *"Hughes"* shall mean, in addition to Hughes Tool Company, any person, firm or corporation (except TWA and its sub-

sidiaries) directly or indirectly controlling, controlled by or under common control with Hughes Tool Company, and any corporation which shall have acquired all or substantially all the assets of Hughes Tool Company by purchase, merger, consolidation or otherwise.

(e) *"TWA"* shall mean, in addition to Trans World Airlines, Inc., any corporation which shall have acquired all or substantially all the assets of Trans World Airlines, Inc. by purchase, merger, consolidation or otherwise.

(f) *"Payment"* shall mean any payment or distribution of any kind or character, or setting aside therefor whether in cash, securities or other property, made, given or permitted, directly or indirectly, by set off, redemption or other retirement, purchase or other acquisition or in any other manner, for the account of or by TWA, or the giving, or the realizing upon, any security, and shall include any distribution, division or application, partial or complete, voluntary or involuntary, by operation of law or otherwise, of all or part of the assets of TWA or the proceeds thereof, to any creditors of TWA or in respect of any indebtedness of TWA, including any such distribution, division or application by reason of any liquidation, dissolution or winding up of TWA or its business or by reason of any sale, receivership, insolvency or bankruptcy proceedings or assignment for the benefit of creditors or any proceeding by or against TWA for any relief under the bankruptcy, reorganization or insolvency laws, Federal or state, or any law, Federal or state, relating to the relief of debtors, readjustment of indebtedness, reorganization, arrangement, composition or extension. The issue of Subordinated Indebtedness in exchange for a like principal amount of other Subordinated Indebtedness shall not be deemed to constitute payment.

(g) *"Reorganization securities"* shall mean any securities or other property delivered in any proceeding referred to in § 2.3 hereof directly to the holders of the Senior Indebtedness or to the Trustee, or delivered to the holders of the Subordinated Indebtedness and by them delivered to the holders of the Senior Indebtedness or to the Trustee, pursuant to any provision of this Article Two.

(h) *"Payment in full"* and *"paid in full"*, in respect of the Senior Indebtedness, shall mean payment in full in cash of the aggregate amount of the principal and premium, if any, of, the

indebtedness represented by, and the interest on (including interest on overdue principal, premium and interest, to the extent permitted by law), the Senior Indebtedness, (i) by the direct payment in cash of such aggregate amount to the holders of the Senior Indebtedness, or (ii) by the realization of such aggregate amount in cash through the sale or other disposition of any property mortgaged or pledged as security for the Senior Indebtedness, and the payment to the holders of the Senior Indebtedness of the cash so realized, or (iii) by the realization of such aggregate amount in cash through the sale or other disposition of reorganization securities delivered to the holders of the Senior Indebtedness or to the Trustee under any provision of this Article Two, and the payment to the holders of the Senior Indebtedness of the cash so realized, or (iv) through any combination of the payments described in the foregoing clauses (i), (ii) and (iii) which shall result in the payment in cash of such aggregate amount to the holders of the Senior Indebtedness. For the purposes of the foregoing definition, the term "payment in cash" shall include any provision for such payment contemplated by subdivision (a) of § 2.3 hereof.

§ 2.2. Except as otherwise provided in § 2.6 hereof, all the Subordinated Indebtedness shall be, and hereby is, subordinated and subject in right of payment to the prior payment in full of all the Senior Indebtedness (other than Senior Indebtedness which shall be deemed to have become Subordinated Indebtedness, as provided in § 2.7 hereof) and each holder of Subordinated Indebtedness hereby directs TWA to make, and TWA hereby agrees to make, prior payment in full of the Senior Indebtedness and to make payments to such holder on account of the Subordinated Indebtedness only after payment in full of the Senior Indebtedness.

§ 2.3. Upon any distribution of all or substantially all the assets of TWA or upon any dissolution, winding up or liquidation of TWA, whether voluntary or involuntary, or upon any reorganization, readjustment, arrangement or similar proceeding relating to TWA or any of its creditors as such or property, whether in bankruptcy, insolvency, receivership proceeding or otherwise, or upon any assignment by TWA for the benefit of creditors or upon any other marshalling of the assets or liabilities of TWA,

(a) all the Senior Indebtedness shall first be paid in full or provision made for such payment by deposit of the requisite cash in trust with the Trustee or other duly appointed paying agents for the purpose before any payment is made on account of the principal of or interest on the Subordinated Indebtedness;

(b) any payment to which any holder of the Subordinated Indebtedness would be entitled except for the provisions of this Agreement shall be paid or delivered by the trustee, receiver, assignee for the benefit of creditors, or other liquidating agents making such payment, directly to the holders of the Senior Indebtedness (or to the Trustee), ratably in accordance with their respective interests, to the extent necessary to make payment in full of the Senior Indebtedness after giving effect to any concurrent payment or provision therefor as aforesaid to the holders of the Senior Indebtedness; and

(c) in the event that notwithstanding the foregoing, any payment shall be received by any holder of the Subordinated Indebtedness before all such Senior Indebtedness is paid in full, or provision is made as aforesaid for its payment, such payment shall be held in trust for the benefit of, and shall be paid over or delivered in precisely the form received (except for the endorsement or assignment of such holder of Subordinated Indebtedness where necessary) to the holders of, the Senior Indebtedness (or to the Trustee), ratably in accordance with their respective interests, for application to or payment of all the Senior Indebtedness remaining unpaid to the extent necessary to make payment in full of the Senior Indebtedness after giving effect to any concurrent payment or provision therefor as aforesaid to the holders of the Senior Indebtedness. Each holder of Subordinated Indebtedness hereby irrevocably authorizes the Trustee, or any of its officers, or any holder of Senior Indebtedness, to make any such endorsement or assignment in the case of his failure or omission to make the same.

Each holder of Subordinated Indebtedness hereby agrees that the holders of the Senior Indebtedness or the Trustee may sell or otherwise dispose of any reorganization securities, for such price or prices and on such terms of payment as such holders or the Trustee in their or its uncontrolled discretion shall determine, and that only the amount

in cash realized through such sale or other disposition of such reorganization securities shall be taken into account for purposes of determining whether the Senior Indebtedness has been paid in full pursuant to the provisions of this Article Two.

§ 2.4. The Trustee is hereby irrevocably authorized and empowered, but shall have no obligation, to demand, sue for, collect and receive every payment required or permitted by the terms of this Agreement to be paid or delivered to the Trustee, and to give acquittance therefor, and to file claims and proofs of claim and to take such other steps or proceedings, including the right to vote the full amount of Subordinated Indebtedness in any proceeding referred to in § 2.3 hereof or at any meeting of the creditors of TWA (whether or not held in connection with any such proceeding) in the Trustee's own name or in the name of any holder of Subordinated Indebtedness, or otherwise, as the Trustee may deem necessary or advisable. In the event the Trustee shall exercise the rights conferred upon it by this § 2.4, each holder of Subordinated Indebtedness agrees to execute and deliver to the Trustee such powers of attorney, proofs of claim, assignments of claim or proofs of claim, or other instruments, or furnish information, as the Trustee may request in order to enable the Trustee to enforce any and all claims upon or with respect to the Subordinated Indebtedness and to collect and receive any and all payments which may be payable or deliverable at any time upon or with respect to the Subordinated Indebtedness. In the event the Trustee shall not exercise the right conferred upon it by this § 2.4 to file a claim or proof of claim in respect of the Subordinated Indebtedness in any proceeding referred to in § 2.3 hereof, within 30 days after being requested so to do by any holder of the Notes, then, unless the Trustee shall have been directed not to file such a claim or proof of claim by a majority of the Noteholders (as that term is defined in § 4.32 of the Note Indenture), any holder of Notes shall have the right to file such a claim or proof of claim.

The Trustee shall not be liable to any holder of Subordinated Indebtedness or to any trustee under any instrument creating Subordinated Indebtedness for any acts done (except such acts as may

have been done by the Trustee in bad faith) in accordance with the provisions of this Article Two.

§ 2.5. Neither the Trustee nor any holder of the Senior Indebtedness shall be deemed to have waived any rights hereunder unless such waiver shall be in writing and signed by the Trustee or such holder, and each waiver shall relate only to the instance therein specified and shall in no way impair the rights of the Trustee or of such holder of Senior Indebtedness and shall in no way affect the obligations or liabilities of Hughes or TWA in respect of any other instance. No delay on the part of the Trustee or of any holder of Senior Indebtedness in the exercise of any right hereunder, or the failure to exercise the same, shall operate as a waiver of such right. Each holder of Subordinated Indebtedness agrees that the Trustee and such holders of Senior Indebtedness, without notice to or the consent of such holder of Subordinated Indebtedness and without affecting to any extent any obligation or liability of such holder of Subordinated Indebtedness or any of the rights of the Trustee hereunder, (a) may accelerate the maturity of any or all of the Senior Indebtedness, in accordance with the respective terms thereof, (b) may exchange, sell, surrender, release, fail to resort to or realize upon, or otherwise deal with, any of the property mortgaged under the Note Indenture and any other property securing Senior Indebtedness, and (c) may enter into agreements amending the Note Indenture or other instruments creating or evidencing Senior Indebtedness, to the extent permitted by the respective terms thereof, provided that such agreements shall not impose any restrictions, in addition to those now set forth in this Article Two, on the right of TWA to make, or the right of such holder of Subordinated Indebtedness to receive, payments of the principal and interest on the Subordinated Indebtedness.

§ 2.6. No payment of principal shall be made on the Subordinated Indebtedness, except as permitted by § 4.30A of the Note Indenture, and no holder of the Subordinated Indebtedness shall be entitled to receive any such payment, unless and until all the Notes shall first be paid in full. No payment of interest shall be made on the Subordinated

Indebtedness if the making of such payment would constitute a default in the performance or observance of any covenant or agreement of TWA contained in § 4.30B or § 4.30C of the Note Indenture, and no holder of the Subordinated Indebtedness shall be entitled to receive any such payment. In the event that notwithstanding the foregoing, any payment shall be received by any holder of the Subordinated Indebtedness in respect of the principal of or interest on the Subordinated Indebtedness, such payment shall be held in trust for the benefit of, and shall be paid over to, the holders of the Senior Indebtedness upon demand by the Trustee or any holder of any of the Senior Indebtedness. Nothing contained in this Article Two (i) shall affect the obligation of TWA to make, or prevent TWA from making, payments of principal of or interest on the Subordinated Indebtedness at any time, except during the pendency of any of the proceedings or upon the happening of any of the events referred to in § 2.3 hereof or under circumstances which would constitute a violation of any of the provisions of this § 2.6 or (ii) shall prevent the payment when due of the principal of or interest on the Subordinated Indebtedness after the payment in full of the Notes.

§ 2.7. In the event that (a) Hughes shall acquire, directly or indirectly, any of the Senior Indebtedness, or (b) Hughes shall acquire, directly or indirectly, any of the Guaranteed Obligations, either in performance or satisfaction of its obligations under its guaranty thereof, or otherwise, then, and in any such case, the Senior Indebtedness and the Guaranteed Obligations (to the extent that such Guaranteed Obligations would otherwise constitute Senior Indebtedness, as defined in this Agreement) thus acquired by Hughes and any obligations issued in renewal, extension, refunding, amendment or modification of such Senior Indebtedness and Guaranteed Obligations shall be deemed, for all purposes of this Agreement, to have ceased to be Senior Indebtedness and to have become Subordinated Indebtedness, as such terms are defined in this Agreement, and shall retain such status of Subordinated Indebtedness until the payment in full of all the Senior Indebtedness, notwithstanding any subsequent sale, hypothecation, transfer or other disposition by Hughes of the Senior Indebtedness or Guaranteed Ob-

ligations thus acquired by Hughes or any obligations issued in renewal, extension, refunding, amendment or modification of such Senior Indebtedness or Guaranteed Obligations. Hughes agrees that, in the event it shall thus acquire any of the Senior Indebtedness or Guaranteed Obligations, it will, forthwith after such acquisition, present the same to the Trustee for endorsement thereon of an appropriate notation referring to the provisions of this Agreement.

§ 2.8. This Article Two defines solely the relative rights as between the holder or holders of the Subordinated Indebtedness and the holders of the Senior Indebtedness. Nothing in this Article Two shall be deemed to impair the obligations of TWA in respect of the Subordinated Indebtedness as between TWA and the holder or holders of the Subordinated Indebtedness. Each holder of Subordinated Indebtedness, whether or not a party hereto, shall by his acceptance of such Subordinated Indebtedness be deemed to have irrevocably agreed to be bound by all the provisions of this Article Two; and every instrument creating or evidencing Subordinated Indebtedness either (a) shall contain an appropriate notation referring to this Agreement and a statement to the effect that each holder of Subordinated Indebtedness by his acceptance thereof agrees to be bound by all the provisions of this Article Two, or (b) shall contain provisions substantially identical with those contained in § 2.2 to §2.6, inclusive, of this Agreement, specifically subordinating such Subordinated Indebtedness to the Senior Indebtedness of the Company to at least the same extent as the Subordinated Debentures are subordinated to the Notes by the provisions of this Article Two, subject to the provisions of the last sentence of § 2.6 hereof, and a statement to the effect that each holder of such Subordinated Indebtedness by his acceptance thereof agrees to be bound by all such subordination provisions.

[25557] *Exhibit "A" to Rowe Affidavit.*

ARTICLE THREE

Miscellaneous

§ 3.1. All requests, notices and other communications hereunder shall be in writing and shall be delivered or mailed addressed to each of the respective parties hereto at its address set forth below, unless such address shall have been changed by written notice to the other parties of such change, in which event it shall be addressed to such changed address:

If to Hughes:

Hughes Tool Company,
2200 Gulf Building,
Houston 2, Texas.

Attention: *Mr. Raymond M. Holliday,*
Vice-President—Finance.

If to TWA:

Trans World Airlines, Inc.,
380 Madison Avenue,
New York 17, N. Y.

Attention: *Senior Vice President—Finance and Treasurer.*

If to the Bank Agent:

Irving Trust Company,
One Wall Street,
New York 15, N. Y.

Attention: *Mr. Robert A. Kerr,*
Vice-President.

If to Equitable:

The Equitable Life Assurance Society
of the United States,
261 Madison Avenue,
New York 16, N. Y.

Attention: *Securities Investment Department.*

If to Metropolitan:

Metropolitan Life Insurance Company,
One Madison Avenue,
New York 10, N. Y.

Attention: *Vice-President and Treasurer.*

If to the Trustee:

Chemical Bank New York Trust Company,
Corporate Trust Department,
100 Broadway,
New York 15, N. Y.

Attention: *Mr. John H. Baile, Trust Officer.*

Any such request, notice or other communication shall be deemed sufficiently delivered or served if mailed by registered or certified mail, postage prepaid, addressed as hereinabove in this § 3.1. provided.

§ 3.2. This Agreement shall not be amended, modified or terminated except with the written consent of each of the parties hereto.

§ 3.3. Hughes agrees that it will not consolidate with, merge into, or convey or transfer all or substantially all of its property as an entirety to, any person unless the successor formed by or resulting from such consolidation or merger or to which such conveyance or transfer is made shall execute and deliver to the other parties to this Agreement, simultaneously with such consolidation, merger, conveyance or transfer, a supplemental agreement to this Agreement wherein the due and punctual performance of the covenants and agreements herein which are to be performed or observed by Hughes shall be assumed by such successor corporation.

§ 3.4. In case any corporation shall become a successor to TWA or any such successor corporation, in accordance with Article Thirteen of the Note Indenture, the term "*TWA*" as used herein shall be deemed to mean and include such successor corporation.

§ 3.5. All covenants, conditions and provisions of this Agreement shall inure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns, including any successor holder of all or any part of the Notes at any time held by any of the Banks or Insurance Companies, and including also, in the case of Hughes (as defined in Article Two hereof), any subsequent holder of the Subordinated Indebtedness (as defined in Article Two hereof), and no other person shall have any legal or equitable right or remedy to enforce the provisions of this Agreement.

§ 3.6. This Agreement shall terminate as to the Trustee upon the payment in full of all the Notes (except such Notes as shall be deemed to have become Subordinated Indebtedness, as provided in § 2.7 hereof).

§ 3.7. The term "Trustee" as used in this Agreement shall mean Chemical Bank New York Trust Company, or any successor in trust, as Trustee under the Note Indenture and not as trustee for any other purpose.

§ 3.8. The Trustee shall not incur any liability to anyone by reason of anything done or omitted to be done by it at the request or direction of a majority of the Noteholders (as that term is defined in § 4.32 of the Note Indenture), or for any action which it may take or refrain from taking in respect thereof upon like request or direction. The Trustee shall not incur any liability whatsoever except for its own individual negligence or malfeasance in the discharge of its duties, nor shall it be liable for any error of judgment made in good faith by any of its agents, officers or employees, unless it shall be proved that the Trustee was negligent in ascertaining the pertinent facts.

§ 3.9. Where it is herein provided that copies of balance sheets are to be delivered to the Trustee, TWA shall (unless said balance sheets have not been delivered to the Noteholders) deliver to the Trustee, in lieu thereof, a certificate signed by any two officers of TWA stating that such balance sheets have been delivered to the Noteholders.

§ 3.10. This Agreement shall be governed by the laws of the State of New York.

Exhibit "A" to Rowe Affidavit.

[25560]

§ 3.11. This Agreement may be executed in several counterparts, each of which when so executed shall be deemed to be an original, and all such counterparts shall together constitute but one and the same Agreement.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the day and year first above written.

* * *

[EXECUTED BY: HUGHES TOOL COMPANY

TRANS WORLD AIRLINES, INC.

IRVING TRUST COMPANY, as Agent for the Banks named in the above-mentioned December 1960 Loan Agreement

[25561]

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

METROPOLITAN LIFE INSURANCE COMPANY

CHEMICAL BANK NEW YORK TRUST COMPANY, as Trustee, as aforesaid]

Affidavit of Raymond A. Cook

[1240]

BEFORE THE

CIVIL AERONAUTICS BOARD

In the Matter of the TOOLCO-NORTHEAST CONTROL CASE	Docket No. 11620 AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

RAYMOND A. COOK, being duly sworn, deposes and says:

1. I am an attorney residing in Houston, Texas, a partner in the firm of Andrews, Kurth, Campbell & Jones, which firm has represented Hughes Tool Company ("Toolco") for over fifty years. In that firm I have been closely acquainted with the financial and business affairs of Toolco for over ten years, and I am personally familiar with the facts and circumstances hereinafter set forth.

2. This affidavit is submitted in light of comments of the Civil Aeronautics Board ("the Board") in its Order No. E-17675 in this proceeding and the reckless accusations of Eastern Air Lines, Inc. previously filed herein, in order to set forth certain facts with respect to Toolco's relations with Trans World Airlines, Inc. ("TWA").

3. The Board in 1944 approved Toolco's initial acquisition of control of TWA (6 C.A.B. 153). In 1950 it approved the acquisition of further control by Toolco over the business and affairs of TWA as a result of a certain 1947 letter agreement (12 C.A.B. 192). In its 1950 decision the Board adopted the findings, conclusions and recommended decision

of its examiner, [1241] including findings that only through the assistance of Toolco had TWA been saved from bankruptcy, that only through Toolco's aid had TWA acquired needed equipment, and that "... The continued interest of Toolco in TWA appears essential to the best interest of the carrier and the public." (Examiner's Report, page 63).

4. As appears from the annexed affidavit of Raymond M. Holliday, TWA's business showed continuous growth from 1947 through 1960, the years in which Toolco nominated a majority of TWA's directors and was in a position to control its business and affairs. During this period TWA which had been on the verge of bankruptcy in 1947 developed into a strong carrier and realized earnings before taxes of $95.6 million.

5. To detail all the financial and other assistance which contributed to this result is beyond the scope of this affidavit. The examiner's report which was adopted by the Board in the further control case sets forth certain instances of such assistance prior to 1950:

> ". ... TWA, with Toolco's aid, continued to expand its fleet of aircraft. The principal additions to its fleet in the years 1947 through 1949 were made possible through special credit arangements with aircraft manufacturers and through borrowings from various banks.
>
> The record shows that this equipment could not have been obtained without the financial assistance of Toolco. Of six Constellations acquired in 1947, four were financed largely from funds advanced by Toolco under the terms of the letter agreement of January 8 of that year. During 1948 previous outstanding purchase money obligations covering nine

> Constellation airplanes were consolidated, with the aid of Toolco, with the financing of twelve new Constellations into a new chattel mortgage. In February 1949, TWA entered into a conditional sales agreement with Toolco for two Constellations. In August 1949, TWA entered into a bank credit agreement to assist in financing twenty more Constellations. As a part of this latter agreement, Toolco agreed to guarantee that the net worth of the carrier would not be less than $20,000,000 as of December 31, 1949. By agreement dated February 2, 1950, TWA purchased six more Constellations under a conditional sales agreement with Toolco. [1242] The arrangements for the purchase of the airplanes covered by this sales agreement were entered into directly by Toolco to assist TWA in acquiring such airplanes. . . ." (Examiner's Report, pp. 30-31).

6. Subsequent to this report, Toolco continued to give similar assistance in response to such requests by TWA as the telegram to Toolco from Ralph Damon, then president of TWA, dated December 6, 1950:

> "UNDER EXISTING CIRCUMSTANCES CANNOT OVEREMPHASIZE THE URGENT IMPORTANCE TO TWA OF OBTAINING THE AIRPLANES NOW UNDER NEGOTIATIONS WITH LOCKHEED STOP TWA CANNOT ACCOMPLISH THIS WITHOUT GUARANTEES FROM TOOL COMPANY AND I URGE UPON YOU THE ADOPTION OF ALL NECESSARY MEASURES TO MAKE THIS PROGRAM POSSIBLE."

7. The Board has implied, however, that Toolco failed to make sufficient jet aircraft available to TWA and was dilatory in arranging financing for such jets as it did make available to TWA. Toolco does not know what information caused the Board to make comments to this effect in its

Order No. E-16195 dated December 29, 1960. The Board's Order was entered upon the application of TWA. The Board's comments were not based on anything contained in said application. They were made without any hearing and without any notice or opportunity to Toolco to present the facts. I participated as counsel for Toolco in TWA's jet equipment program and the financing thereof from their inception. The facts known to me do not support or justify such an implication.

8. In 1955 TWA and Toolco recognized that if TWA were to maintain its competitive position it would require a fleet of jet aircraft substantially as soon as its principal competitors and that orders for such equipment could not be delayed. In December 1955, A. V. Leslie, then and now TWA's Senior Vice President—Finance, advised Toolco that, even if TWA were to receive the then contemplated assistance by Toolco with respect [1243] to acquisition of certain piston-engined aircraft, TWA did not and would not have the financial credit or resources to order any jet aircraft prior to the end of 1958 at the earliest and that if orders for such aircraft were to be placed Toolco would have to bear the burden at least to that time. Toolco, with full knowledge of the enormous commitments which it was making, during 1956 voluntarily used its own resources and credit to place orders for the acquisition of a fleet of jet aircraft from Boeing Airplane Company ("Boeing") and the Convair Division of General Dynamics Corporation ("General Dynamics") for use by TWA. Prior to the execution of these contracts the type of equipment, the form of the contracts and the specifications of the aircraft were approved in detail by the operating and engineering personnel of TWA; and thereafter their representatives supervised their manufacture, testing and delivery.

9. Toolco's total commitments in connection with this jet equipment program exceeded $300,000,000. Toolco, even if it had desired to do so, could not by itself supply permanent financing for such a fleet. By reason of the vast amount required, such permanent financing could be accomplished only with the assistance of one or more of the three principal suppliers of long-term financing to the major air carriers, namely, Equitable Life Assurance Society of the United States ("Equitable"), Metropolitan Life Insurance Company ("Metropolitan") and Prudential Life Insurance Company of America ("Prudential"). By 1956 Equitable had established itself as TWA's traditional senior lender, holding $40 million of TWA's 3¾% Equipment Mortgage Sinking Fund Bonds ("the Sinking Fund Bonds") due December 1, 1969. Toolco was advised by various investment bankers that by reason of Equitable's position as traditional senior lender to TWA, permanent financing of TWA's jet equipment program could not be accomplished without Equitable's support.

[1244] 10. Toolco recognized that in order for such permanent financing to be accomplished TWA would require additional equity capital. In 1957 it underwrote an offering by TWA to its shareholders of an additional share for each share held. From this offering TWA obtained additional equity capital in excess of $43 million.

11. Toolco discussed with Equitable in 1958 Equitable's requirements as to the permanent financing of TWA's jet equipment program. In such discussions Equitable indicated (a) that TWA's financial condition had not improved sufficiently so that it could independently finance the required jet fleet and that Toolco would either have to supply a substantial portion of such financing itself, or to be responsible for the obligations incurred by TWA, (b) that

before it would participate in any financing by TWA, Equitable would expect that in accordance with a precedent established in 1947 an agreement would be made that in the event of default by TWA, Toolco's stock interest in TWA would be placed in a lender-controlled voting trust, and (c) that as a part of any financing TWA's Sinking Fund Bonds which Equitable held would have to be refunded.

12. The discussions with Equitable during 1958 were unsatisfactory to Toolco, primarily because it appeared that Equitable was not prepared to finance TWA's jet program without the assumption of substantial permanent obligations by Toolco. In early 1959 Dillon, Read & Co. Inc. ("Dillon Read") was retained to prepare plans for the permanent financing of TWA's jet equipment program. Dillon Read advised Toolco and TWA that since Equitable was TWA's traditional senior lender, its support and participation was essential to the development of any permanent financing.

[1245] 13. In view of the apparent difficulties to the independent financing by TWA, Toolco, in cooperation with TWA, developed a plan for permanent financing through a leasing arrangement. TWA's investment bankers undertook to and did develop a proposal for a leasing arrangement on terms which they believed would be advantageous to TWA. The proposal developed by Dillon Read was presented to TWA's president, Charles S. Thomas ("Thomas"). He refused to accept it, however, on the principal grounds that a large airline should own its own equipment and that Equitable would not support such a plan.

14. Toolco had reason to believe that with the public acceptance of jet aircraft proven and the consequent improvement in the earnings of TWA, TWA would be in a position to finance independently its jet equipment program.

Early in 1959 Boeing commenced the delivery of jet aircraft ordered by Toolco. As such aircraft were received, they were placed in service by TWA under day-to-day leases which were approved by the Board. Toolco thus enabled TWA to place jet aircraft in trans-continental service substantially at the same time as one of TWA's principal domestic competitors and considerably in advance of its other principal domestic competitor. As a result of this early introduction of jet equipment TWA realized earnings before taxes in excess of $17.4 million in 1959 and in excess of $15.2 million in 1960.

15. Toolco financed the acquisition of jet aircraft leased to TWA out of its own cash resources until they were practically exhausted. Thereafter, such jet aircraft were financed largely through loans from Irving Trust Company ("Irving"), TWA's and Toolco's lead bank, and other banks. Such loans were made available to Toolco until early in 1960. Although Irving informed Toolco in 1959 that it had exhausted its legal loan limit, its consents to subsequent loans con- [1246] tinued to be required by reason of the terms of its existing loans. In 1959 Toolco advised Irving that such interim credit should not be terminated without giving Toolco adequate lead time either to arrange other interim credit or to consummate a plan for the permanent financing of TWA. In early 1960, Irving learned of negotiations which Toolco had commenced with aircraft manufacturers for assistance in the financing of not only TWA's then planned jet fleet but also of additions thereto. Thereafter, Irving and the other banks involved, without prior notice to Toolco, on March 5, 1960 advised Toolco that they would no longer supply any short term credit for the purpose of paying for further deliveries of jet equipment for TWA. The payment of rentals due from TWA to Toolco under the leases of jet aircraft by Toolco to TWA would

have provided at least a partial alternative source of moneys to Toolco to be used in making payments for jets thereafter to be delivered. Equitable, however, refused to permit TWA to make any such payments.

16. In March 1960, Toolco agreed to support a plan, later known as the "Dillon Read Plan", which contemplated that Equitable and one or more other insurance companies would supply permanent senior long-term financing, Irving and associated banks would supply short-term and interim senior financing to TWA and Toolco would accept $100 million of subordinated debt of TWA in payment, *pro tanto*, of TWA's obligations to Toolco and also establish a revolving credit in favor of TWA in the amount of $50 million. Equitable agreed to participate in such financing but only on condition that Toolco agree:

(a) To the acceleration of the maturity of $31,000,000 principal amount of TWA's Sinking Fund [1247] Bonds due in 1969 held by Equitable so that such bonds would mature at the same time as the interim bank debt and to an increase in the interest rate of said bonds to the same interest rate as on the interim bank debt;

(b) To a guarantee by Toolco of the payment of said bonds;

(c) To the interest rate for the permanent financing supplied by the insurance companies being one-half of 1% greater than for the bank financing; and

(d) To an agreement to be executed between and among Toolco, TWA and an agent for the lenders that in the event of certain defaults, including a default as a result of a change of management, the TWA stock owned by Toolco would be placed in a voting trust controlled by the lenders.

On March 28, 1960 Toolco, notwithstanding the onerous nature of such conditions, agreed in writing to the Dillon Read Plan and to the terms imposed by Equitable. This agreement was personally executed by Howard R. Hughes ("Hughes"). A copy thereof is annexed hereto as Exhibit "A".

17. No interest rates were provided in the Dillon Read Plan as drafted and agreed to by Toolco in March 1960. Dillon Read's senior partner indicated, however, that the interest rate on the permanent bank financing would be in the neighborhood of five or five and one-half percent. Irving, through its Senior Vice President, Ben-Fleming Sessel ("Sessel"), advised TWA and Toolco that negotiations as to interest rate would have to await the formation of a banking group and told [1248] Toolco and TWA that when a banking group was formed, Toolco and TWA would have a full opportunity to negotiate the interest rate. Accordingly, Toolco and TWA did not seek to negotiate any interest rate until after Irving had formed a banking group. When such a banking group was formed, Irving announced to Toolco and TWA that the interest rate on the bank financing would be 6% and refused to negotiate or to permit Toolco to negotiate with the banking group the rate of interest. By reason of Equitable's demand, such a rate would mean a rate of 6½% on the insurance company financing.

18. When Toolco protested that, notwithstanding the representations made to it by Sessel, no opportunity had been given to it or to TWA to negotiate the interest rate on the bank financing, Toolco was informed that Irving had obtained the participation of other banks in the group which it headed by representing to them that the rate would be 6%. I am informed and believe, however, that

unknown to TWA and Toolco, Irving had refused to permit three major New York banks, including New York's two largest banks, to participate in this banking group. TWA and Toolco agreed to this interest rate, which was in excess of that which Toolco had been advised by Dillon Read could be expected, for the reason that no acceptable alternative for the Dillon Read Plan appeared feasible.

19. In May 1960, the lenders, including Metropolitan which had agreed to supply the portion of the insurance company financing not being supplied by Equitable, committed themselves to the Dillon Read Plan but under conditions which permitted them to withdraw their commitment in the event of a change in TWA's management deemed by them to be adverse. This commitment, together with the commitment of TWA and Toolco, [1249] formed the basis for the preparation of definitive documents as promptly as possible by the lawyers of the interested parties. TWA also entered into an agreement with a banking group headed by Irving under which TWA could borrow up to $40,000,000 to be used as interim financing for the jet equipment program and to repay existing bank loans. Toolco agreed to guarantee all such interim borrowings by TWA. TWA, in May 1960, borrowed $27,500,000 pursuant to this agreement. Said borrowings became due on the initial closing date fixed for the permanent financing. The maturity of TWA's Sinking Fund Bonds held by Equitable was accelerated to the same date with Toolco also guaranteeing this indebtedness of TWA. Board approval of the proposed financing was sought and obtained. The initial closing date for the permanent financing was fixed for June 23, 1960, but was thereafter postponed to July 23, 1960, at the request of Equitable, and then to July 31. The financing of TWA's jet equipment program would presumably have been effected on or about that date had it not been for the unexpected resignation of TWA's president, Thomas.

20. The detailed circumstances relating to the resignation of Thomas, and to the involvement of the lending institutions with his resignation, are outside the scope of this affidavit. Prior to his resignation Thomas made certain demands for compensation which Toolco refused to recommend to TWA under pressure of the financing. At the same time, Toolco expressed its willingness to provide Thomas with equivalent benefits payable by Toolco. On July 21, 1960, Toolco advised representatives of the lending institutions that Thomas, having finished the two years of service to which he was committed, intended to resign. Toolco urged the lenders [1250] to conclude the financing agreed upon and advised said representatives that if it was unable to induce Thomas to continue as president of TWA, it would recommend to the TWA Board a successor president acceptable to the lenders. The lenders, however, refused to acquiesce in any plan that would permit Toolco to name a successor president. Thomas, after conversations with executives of Equitable and Metropolitan, on July 27 submitted his resignation as president of TWA. Immediately upon his resignation Equitable and the other lending institutions claimed that there had been an adverse change in TWA's management and exercised the out which they had insisted be included in the loan agreement.

21. It was Equitable and the other lenders, not Toolco, which jettisoned the financing of TWA's jet equipment program. The choice of a qualified president for TWA was never a genuine issue, inasmuch as Toolco repeatedly offered to recommend a president acceptable to the lenders, and in fact, did propose for their consideration several qualified executives. Among those whom Toolco proposed were Mr. Fred M. Glass, Executive Vice President, Empire State Company, and James W. Austin, President of Northeast Airlines. Toolco offered to consider any alternative

suggestions of the lenders but they made none. I have concluded from the facts known to me that the resignation of Thomas, whether or not induced by the lenders, was an excuse used by the lenders for terminating their commitment to a financing plan which did not include a lender-controlled voting trust prior to a default. On August 1, 1960, the day following their termination of the financing plan to which Toolco had agreed in March, 1960, the lenders advised Toolco that they would renew their commitment only on condition that [1251] Toolco place its TWA stock in a lender-controlled voting trust prior to the financing. At the same time the lenders placed on TWA an effective prohibition against acceptance by TWA of the delivery of any of the jet equipment which had been assigned to TWA by Toolco, pending a financing on their terms.

22. Although Toolco had agreed in March, 1960, that as a protection to the lenders it would place its TWA stock in a voting trust in the event of a default, Toolco was unwilling to agree as a condition of such financing to turn over control of TWA to the lenders in advance of any default. It was the position of Toolco that such a requirement bore no reasonable relationship to the protection of the lenders. Toolco promptly requested Irving to undertake on Toolco's behalf to develop an alternate plan of financing. This undertaking was accepted by Irving, and for a period of approximately seven weeks thereafter, Irving repeatedly represented to Toolco that in cooperation with another bank it was engaged in such effort. On or about September 13, Irving presented to Toolco the first draft of a plan which came to be known as the "Bank Plan". Toolco informed Irving that this draft provided for repayments by TWA over such a short period of time that it did not seem to be feasible from the point of view of TWA. Representatives of Toolco repeatedly requested Irving that they be per-

mitted to participate in the negotiations among the several banks which were to be parties to such financing, but Irving consistently refused to permit such participation. Sessel said, "You are now in the hands of the banks and will do what we say."

23. Irving was in a position to apply economic pressure on Toolco because (a) TWA had a pressing need for further deliveries of jet equipment; (b) Toolco owed Irving approximately $15,000,000 on secured loans incurred for the benefit of TWA all due and payable; (c) Toolco was guarantor [1252] of $27 million owed by TWA to Irving and the other TWA banks on loans having matured on August 31; (d) Toolco was a guarantor of approximately $27 million of TWA's Sinking Fund Bonds which were held by Equitable and which had matured on August 31; and (e) Hughes was indebted to Irving in a substantial amount on a personal loan which matured on October 31 and which was secured by all of the stock of Toolco.

24. In the late evening of September 26, 1960, Irving presented to Toolco the so-called Bank Plan by delivering to Toolco the memorandum attached hereto as Exhibit "B". Irving demanded that Hughes personally sign a copy of this memorandum by the opening of business on the following day. Hughes did so, notwithstanding the objections of Toolco's representatives to Irving that the Bank Plan contemplated General Dynamics' supplying $40 million of credit, that Irving had refused to permit General Dynamics to participate in negotiations of the Plan, and that Toolco doubted General Dynamics' ability to supply this credit. Toolco's doubts were confirmed on September 29 when General Dynamics reported that its principal lender, Prudential, had refused to permit General Dynamics to commit to such a credit. Upon receiving this report Irving sum-

marily announced that it had already taken action to offset against the deposit balances of Toolco and TWA the substantial debts which Irving and its participant banks held. After protest Irving agreed to give to Toolco until October 5 by which to develop and present an alternate plan.

25. On October 5 Toolco presented to Irving the plan set forth in the letter attached hereto as Exhibit "C". This plan was in effect identical to the Bank Plan with one alteration, namely, that Toolco would commit to provide $30 million of the credit which the Bank Plan had previously required of [1253] General Dynamics. Such plan also committed Toolco "to recommend to the TWA Board of Directors the election of a president acceptable to the lenders upon their request".

26. On October 6 the banks met, avowedly to consider Toolco's offer. In midafternoon Toolco's representatives were called into the meeting and advised by Sessel that the plan had been turned down and that unless by 5:00 P.M. EDT Toolco had agreed, by written document executed by its president, Hughes, to accept the Dillon Read Plan with a lender-controlled voting trust, the banks would commence offsetting deposit balances of TWA and Toolco against indebtedness due the banks. Sessel further stated that if the conditions of the banks were not met he would place Toolco in receivership and would collect summarily the debt owed to Irving by Hughes personally and proceed immediately with a private foreclosure of his stock in Toolco.

27. Toolco acceded to the demands of Irving provided that TWA be given the right to refund the senior indebtedness without premium or penalty and that Toolco be entitled to purchase all such indebtedness at 100% of the principal amount plus accrued interest. A copy of Toolco's

acceptance letter is attached hereto as Exhibit "D". The terms of such letter were accepted by Irving and the other banks and were approved in principle by a representative of Equitable.

28. After Toolco had acceded to Irving's demands, Metropolitan demanded for the first time that Toolco's right to acquire the bank and insurance company debt and thus terminate the voting trust be subject to the payment of a penalty to be initially $20,416,000, i.e. 22% of the principal amount of the insurance company debt plus accrued interest. [1254] I am informed and believe that this punitive demand was made by Metropolitan after consultation with representatives of other lending institutions, that it was not designed to provide security for the insurance companies or to insure the repayment of their loans but was calculated to insure that Metropolitan's and Equitable's control over TWA through the voting trust would be maintained and perpetuated.

29. Toolco promptly submitted to Equitable an alternate proposal which contemplated a voting trust but reserved to Toolco a right to purchase the senior notes for 100% of their principal amount plus accrued interest. In order to replace the participation of Metropolitan and to reduce Equitable's participation to an amount not greater than its existing loan to TWA, Toolco, in this proposal, committed to take $67.3 million of the Sinking Fund Notes. A copy of that proposal is attached hereto as Exhibit "E". As can be seen from a review of that proposal, it gave to the lending banks an improved security position. Nevertheless, Irving peremptorily refused to participate in this plan, Sessel saying in effect, "We have decided we do not want to do business with Hughes." Sessel clearly indicated that he was reflecting an agreement or understanding among some if not all of the lending institutions involved.

30. Thereafter, on October 19, 1960, Equitable and Metropolitan in identical terms stated to Toolco and TWA their willingness to reinstate the Dillon Read Plan, provided (i) that Toolco agree to place its TWA stock in a voting trust controlled by Metropolitan and Equitable; (ii) that Toolco consent to a penalty in the initial amount of 22% on $92,800,000 as a condition to termination of the voting trust by refinancing their loans to TWA; (iii) that the by-laws of TWA (providing [1255] for reconstitution of the TWA Board of Directors by a majority of the stockholders at any time without cause) remain unchanged; and (iv) that no employment contract be made with an executive officer of TWA providing for tenure of office beyond the date of the next annual election of officers. The additional demands thus made appear to have been designed and calculated to give to Equitable and Metropolitan the power to determine the management of TWA, including its chief executive officer, to reconstitute the Board of Directors of TWA at will, and to manage and control the business and affairs of TWA in such manner as they should determine.

31. Also on October 19, 1960, Irving made a similar proposal to TWA and Toolco. Irving stated that acceptance of Metropolitan's and Equitable's proposals was a prerequisite to any commitment by it and its participating banks. Irving also stated that in the event it, as agent for the other lending banks, did not have Toolco's unconditional agreement in writing to its proposal by October 21, 1960, Irving and the other lending banks would enforce their rights of collection of TWA's debts by all available remedies, including the right of set-off.

32. Toolco received the October 19 letters on Friday, October 21, the day on which Irving's ultimatum expired. Toolco then endeavored to negotiate a reduction of the 22%

premium but the lenders remained adamant. Thereupon, Toolco agreed orally to accept the lenders' demands upon an understanding with Irving as to the procedure by which TWA's Board of Directors might authorize TWA's participation. That understanding was later denied by Irving and Sessel and I am informed and believe that Sessel has given accounts which do not fairly reflect what took place.

33. Toolco's officers and attorneys who were serving [1256] as its nominees on the TWA Board had historically assumed that they would be indemnified by Toolco against any liabilities incurred while serving as directors of TWA. Toolco concluded that the existence of such an indemnity could increase the legal responsibility of Toolco for acts of its nominee directors. In considering the demands of Irving and the other lending institutions, Toolco decided that it was unwilling to assume any risk or criticism by reason of any action of TWA's Board in adopting a financing plan which might be found to be against the best interests of TWA. Toolco therefore entered into an oral understanding with Irving through Sessel that a full quorum of TWA's Board of Directors be asked to pass upon the financing, after the Toolco nominee directors had been notified that they no longer could assume that they were being indemnified by Toolco. On the basis of this understanding with Irving, Toolco accepted the October 19 demands of the lenders. When, however, Toolco requested Sessel to support TWA's request to Metropolitan and Equitable for an extension of time over the weekend to permit the TWA Board to meet pursuant to the agreed arrangement, Sessel, who was himself a nominee of Toolco as a director of TWA, without permitting discussion or explanation, heatedly accused Toolco's representatives of deceit, telephoned executives of the insurance company lenders and persuaded them not to grant TWA's request for an extension, and on behalf

of all of the lending banks announced that their commitment was withdrawn. The following day Toolco cancelled its commitment by transmitting to Metropolitan and Equitable copies of its letter to Irving attached hereto as Exhibit "F".

34. Thereafter, Toolco endeavored to develop, without assistance from the Irving banking group, another plan of [1257] financing TWA's requirements. I am informed and believe that Toolco's efforts to develop such a plan were unsuccessful for reasons which included (a) the unwillingness of other lending institutions to finance TWA without the approval and support of Equitable, TWA's traditional senior lender, (b) the dependency of the airline industry upon a few large lending institutions which are in a position to control and dominate the market, and (c) the attitude of the financial community which appears to have been based on erroneous assumptions of fact. Hence, on November 30, 1960, Toolco committed itself to accept the Dillon Read Plan with provisions which placed the lending institutions in control of TWA, and that financing was consummated on December 30.

35. The Board issued its Order No. E-16195 on December 29, 1960 without a hearing. Notwithstanding my understanding that Section 408 of the Federal Aviation Act provides that it is unlawful for a person engaged in a "phase of aeronautics" to acquire or maintain control of an airline except after a hearing and a determination that such acquisition of control is not inconsistent with the public interest, Metropolitan and Equitable, principal suppliers of financing to major airlines, acquired and are maintaining control of the business and affairs of TWA. Metropolitan and Equitable as the holders of a majority of TWA's notes obtained the absolute right and power to remove at any time without cause two of three voting

trustees who have the power to vote 78.2% of TWA's common stock. They also obtained the uncontrolled right to appoint their successors. Said two voting trustees in turn, by reason [1258] of the provisions of TWA's by-laws, have the absolute right and power at any time to reconstitute TWA's Board of Directors and have used this power to remove from said Board all representatives of Toolco with the single exception of Raymond M. Holliday, the voting trustee named by Toolco. Since December, 1960, TWA has been under the complete control of persons who have no substantial, if any, ownership interest in the airline, and who, I believe, have used their position to expand and maintain their control.

36. The history of Toolco's efforts to provide TWA with a jet fleet and to assist TWA in the financing thereof in no way supports the Board's comments in its December 29, 1960 Order. The charge there made that Toolco by delaying such financing imposed a higher interest rate on TWA is without foundation. Even if it is assumed that the trend in interest rates was not correctly anticipated by Toolco or the TWA management, I believe that such errors are not unusual. In any event, TWA in 1955 advised Toolco that it could not enter into any financing for jet acquisitions prior to 1959 at the earliest. In 1960 when a financing first became feasible, the interest rate was fixed by Irving's announcement and Equitable's demand at a rate higher than Toolco had been led to expect by TWA's investment banker.

37. The implication in the Board's December 29 order that Toolco wrongfully delayed TWA's financing and therefore wrongfully delayed the delivery of Convair aircraft to TWA is similarly without foundation. The delays in delivery were occasioned by delays in financing, but those delays were occasioned not by Toolco but by the lending

institutions' [1259] refusal to close the financing as scheduled in July, 1960, by their insistence that TWA take no deliveries of Convair aircraft after August 1, 1960, and by their ever-increasing demands that Toolco turn over control of TWA to them upon terms calculated to perpetuate that control.

38. Although the Board indicated in its December 29 order that Toolco might well have provided a larger jet fleet to TWA, TWA was unable to acquire any jet fleet with its own credit and resources, and the size of the fleet which TWA did acquire was determined only after consultation with Thomas. Reductions in the size thereof through the release of certain Boeing aircraft to Pan American World Airways in 1959 and the reduction from 30 to 20 in the number of Convair 880 aircraft to be acquired by TWA were made only after consultation with and pursuant to the recommendations of Thomas. Moreover, no airline can determine the size of its fleet without reference to its financial capabilities and by this standard TWA would have been unable to acquire the jet fleet which it in fact acquired and financed only through Toolco's assistance.

39. In its Order No. E-17675 in this proceeding the Board stated that it must take notice of the allegations by TWA in the action which it has commenced against Toolco in the Southern District of New York of "various acts on the part of the Toolco management in derogation of their managerial responsibility and antitrust violations of the Sherman and Clayton Acts". This affidavit is not the place to litigate a charge of antitrust violations which Toolco has moved to dismiss as without merit. In so far as "acts on the part of the Toolco management in derogation of their managerial [1260] responsibility" can be gleaned from the allegations of the complaint, brief comment may be appropriate:

(a) The allegation that Toolco controlled TWA's equipment purchases and financing is no more than an allegation that Toolco controlled TWA, which is conceded.

(b) The allegation that Toolco "diverted" Boeing aircraft to Pan American overlooks that such "diversion" was done with the full approval of Thomas, TWA's then president, and the other operating executives of TWA, and in accordance with their opinion that such "diversion" was in TWA's best interests; it also overlooks the obvious fact that TWA by itself could not finance the aircraft it did acquire.

(c) The alleged "diversion" of Convair 880 aircraft to Northeast was related to the proposed merger between Northeast and TWA; the reduction of the number of 880 aircraft to be acquired by TWA from 30 to 20 was in accordance with the recommendation of Thomas.

(d) The alleged delays in the delivery of Convair 880 aircraft, to the extent that they resulted from events which were in any way within the control of Toolco, arose from delays in TWA's financing, the responsibility for which has already been sufficiently described.

(e) The allegations that Toolco attempted to merge Northeast into TWA for some sinister purpose and pursuant to some conspiracy with Atlas Corporation is absurd. Toolco did negotiate such a merger to remedy the serious seasonal imbalance in TWA's route structure. When the merger agreement had been negotiated, it was submitted to TWA by Toolco. TWA's operating personnel [1261] reviewed the

merger agreement and fully supported the merger. Toolco continues to believe that such a merger would be in the best interests of TWA. TWA's management until recently apparently agreed, taking the position in Northeast's route case that Northeast's route south of New York should be renewed as part of a merged operation "and TWA is the only logical candidate for such a merger". In any event, the merger agreement specifically provided that the merger could not be consummated without the consent of (i) a majority of TWA's stockholders other than Toolco, (ii) the Board, (iii) the Securities and Exchange Commission, which under the Investment Company Act could only give such approval after a finding that the merger terms were fair and equitable and that the merger did not involve over-reaching on the part of any person concerned, and (iv) TWA's senior lenders.

(f) The charges that subsequent to the imposition of the voting trust Toolco "maliciously and wilfully" interfered with the business of TWA are incredible on their face in light of Toolco's continuing ownership interest in TWA and TWA's substantial indebtedness to Toolco, and their groundless nature is shown in the annexed Holliday affidavit.

40. The record of Toolco's financial assistance to TWA is too clear to require any response to Eastern's name-calling and invective heretofore filed in this proceeding.

/s/ RAYMOND A. COOK
Raymond A. Cook

[JURAT: November 22, 1961]

[3784]

Notice of Motion

[CAPTION] 61 Civ. 2324

Sirs:

PLEASE TAKE NOTICE that upon the annexed "Complaint of Hughes Tool Company and Request for Investigation" which was filed with the Civil Aeronautics Board today and upon all proceedings herein, the undersigned will move before Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, at such place as shall be fixed by him, on February 8, 1963, at 10:00 o'clock in the forenoon or at such other time as shall be fixed by the Court, for an order (1) that all further proceedings with respect to the counterclaims of Hughes Tool Company herein be stayed pending the entering of a final order by the Civil Aeronautics Board with respect to said "Complaint of Hughes Tool Company and [3785] Request for Investigation" and (2) for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y., February 6, 1963.

Yours, etc.,

CHESTER C. DAVIS, Esq.

* * *

[The "Complaint" referred to in the above Notice of Motion has been reproduced at pages A-145—A-162, *Supra.*]